87-988

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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE H. KASPER, JR.

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(Pro Se)

December 16, 1987.

PUBLISHER'S NOTE:

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QUESTIONS PRESENTED

CENTRAL ISSUE

The central issue is: whether Federal National Mortgage Association (FNMA) is now such a "private corporation" that it can discharge and involuntarily retire its older civil service government employees "at will", "without cause" or "due process" and replace them with new younger employees because it "prefers to have some one else"?

FIRST QUESTION

Whether FNMA can use the lawful Civil Service early retirement plan, to effect mandatory retirement when civil service employees become eligible for annuity, without economic or business purpose showing, or whether its use is a subterfuge to evade the purpose of the plan and the law?

SECOND QUESTION

Whether there exist in FNMA, a federally created instrumentality whose stock is privately owned, sufficient "close nexus" between its "Federal Action" in administering the Federal Civil Service program and carrying on the operations of Government National Mortgage Association (GNMA) by contract, and its employment actions with Petitioner, so as to make applicable the "Due Process" provisions of the United States Constitution?

THIRD QUESTION

Whether the Third Cause of Action, seeking damages for loss of compensation, terms conditions and privileges of employment, supported by [1] Presidential Executive Order, [2] Civil Service Retirement law, [3] FNMA Charter Act, [4] written employment contract, and [5] FNMA Policy and Operating Malual (POM) was properly dismissed by Judgment on the Pleadings?

FOURTH QUESTION

Whether U. S. Government employees who transferred to FNMA in 1968 lost and forfeited rights which they had as government employees to employment action based on merit alone and to procedural "due process"?

FIFTH QUESTION

Whether the "notice" holding in Delaware State College v. Ricks, is properly applied in the facts of this case, to a FNMA Memo to Files providing "Continuing Employment Arrangements.." (for a year to create a year of civil service employment), as a basis for final, authoritative, unambigious notice to Petitioner of FNMA's intent to mandatorily retire him, against his will, as soon as he became eligible for annuity?

SIXTH QUESTION

Whether Petitioner's two affidavits with ATTACHMENTS were sufficient to show a genuine issue of material fact as to whether FNMA misled him regarding "the facts of" his employment status with FNMA, thus tolling the filing requirements of the ADEA?

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

George H. Kasper, Jr., (Petitioner).

Federal National Mortgage Association (Respondent).

TABLE OF CONTENTS

	Page
Questions Presented	1
Central Issue	1
First Question	1
Second Question	2
Third Question	2
Fourth Question	3
Fifth Question	3
Sixth Question	4
Interested Parties	4
Table of Contents	i
Table of Citations	iii
Opinions Below	5
Jurisdiction	5
Constitutional provisions, Statutes & Regulations involved	vii
Statement of the Case	6
Course of Proceedings i	6
Petitioner's Complaint ii	7
Statement of facts iii	13

Standards of Review 36

Argument 38

First Question 38

Second Question 41

Third Question 46

Fourth Question 53

Fifth Question 56

Sixth Question 60

Conclusion 64

Appendix

Order, 18 th December 1984. A-1

Transcript - Order May 6, 1986 A-12

Order (11 Cir.) August 3, 1987 A-20

Order - On Rehearing October 26, 1987 A-41

Certificate of Service

TABLE OF CITATIONS

Page no.

Federal Court Decisions

Alexander v. Gardner-Denver Co. 415 U.S. 36, 39 L Ed.2d 147, 94 S.Ct. 1011, (1974) 63

Ashton v. Civilette, 613 F.2d 923 (App. D.C. Dist Co. 1985) 51

Beacon Theatres v. Westover, 79 S. Ct. 948 36

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L. Ed.2d 684 (1976). 51

Board of Regents v. Roth 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed.2d 548 (1972) 51,52

Brooklyn Savings Bank v. O'Neil 324 U.S. 697, 89 L. Ed.1297, (1944). 63

Cannon v. University of Chicago, 441 U.S. 667, 99 S.Ct. 1946, (1979). 48

Cleveland Bd. of Educ. v. Loudermill 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed2d 494 (1985). 52

Coke v. General Adjustment Bureau, Inc., 640 F. 2d 584, (5 Cir. 1981) 37

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). 36

Cort v. Ash, 422 U.S. 66 46,47,48
95 S.Ct. 2080, 45 L.Ed2d 26
(1975)

Delaware State College v. Ricks 3,56
449 U.S. 250, 101 S.Ct. 498 57,58,59
66 L. Ed2d 431 (1980).

Doe v. Casey, 601 F. Supp 581 51
(D.C. Dist. Col. 1985).

E.E.O.C. v. Baltimore and Ohio R. 39
Co., 632 F.2d 1107 (4 Cir. 1980)

Evans v. Newton, 382 U.S. 296, 43
86 S.Ct. 486, 15 L. Ed. 373
(1966).

Federal National Mortgage Assoc- 44
iation v. Lefkowitz, 390 F.Supp.
1364 (S.D.N.Y. 1975).

Fountain v. Filson, 336 U.S.681 37
69 S. Ct. 754, 93 L. Ed. 971,
(1949).

Goldstein v. Manhattan Industries, 63
Inc.,758 F. 2d 1435, (11 Cir 1985).

Hannan v. Chrysler Motors Corp., 38
443 F.Supp. 802 (E.D. Mich. 1978).

Isaac & Assoc. v. Federal National 44
Mortgage Association, 647 S.W. 2d
495 (Ky. App 1982).

Jackson v. Metropolitan Edison Co., 44
419 U.S. 345, 95 S.Ct. 453, 42 L.
Ed 2d 477 (1974).

Keiser v. Walsh, 118 F2d 13, 37
73 App. D.C. 167 (1941).

Mason v. Lister, 562 F.2d 343 (5 Cir. 1977). 38

Maxfield v. Sinclair Intern. 766 F.2d 788 (3 Cir. 1985). 38

McCorstin v. United States Steel Corp., 621 F2d 749 (5 Cir. 1980). 38

Meyer v. Riegel Products Corp., 720 D. 2d 303 (3 Cir 1983). 62

Northrip v. Federal National Mortgage Association, 527 F 2d 23 (6 Cir. 1975). 41,42 43,44

Ott v. Midland-Ross Corp., 600 F. 2d 24 (6 Cir. 1979). 62

Paige v. Harris, 584 F. 2d 178 (7 Cir. 1978). 51

Palmer v. Columbia Gas of Ohio, 479 F. 2d 153. 43

Parker v. Federal National Mortgage Association, 741 F. 2d 975 (7 Cir. 1984). 61

Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 (1972). 51,52

Rubin v. O'Koren, 644 F. 2d 1023 (5 Cir. Unit B. 1981). 59

Services v. Dulles, 354 U.S. 363, 77 S. Ct. 1152 (1957). 51

Schellfeffer v. United States, 343 F. 2d 936 (Ct. Cl. 1965) 40

Turner v. Impala Motors, 503 F. 2d 607 (6 Cir 1974). 43

TransAmerica Mortgage Advisors v. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979). 48

Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968 (1959). 49,51

Federal Statutes and Regulations

Fifth Amendment to the Constitution of the United States, vii 52

5 U.S.C.A. § 8336(d) [Mason:§ 8336(d)(2) & 8332(d)(2)], viii 38

12 U.S.C.A. § 1717, et seq. 7

12 U.S.C.A. § 1723a(d)(2), vii

28 U.S.C.A. Rule 8, (a)(2), (e)(1), (f), x

29 U.S.C.A. § 621, et seq. 39

Code Federal Regulations, 24 C.F.R. ch III Subchapter A part 300, xii,45

Presidential Executive Order No. 11141, February 12, 1964, 29 F.R. 2477, x,49

Books

Webster's Third New International Dictionary (1986). 60

OPINIONS BELOW

United States District Court Order December 18, 1984, granting FNMA Motion for Judgment on the Pleadings. (A-1). Transcript of District Court Hearing, May 6, 1986, granting FNMA Motion for Summary Judgment and DISMISSAL, (A-12), Judgment of Eleventh Circuit Court of Appeals, August 3, 1987, affirming District Court, Petition for rehearing denied October 26, 1987 reported as Calhoun v. Federal National Mortgage Association, George H. Kasper Jr., Intervenor-Appellant (___F.2d____). (A-20, A-41).

JURISDICTION

Petitioner seeks review of the Eleventh Circuit Court of Appeals Judgment of August 3, 1987. Timely petition for rehearing was denied October 26, 1987. Petition for Certiorari was filed within 90 days.

This Courts Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amemdment of the Constitution of the United States provides:

> "No person shall...be deprived of life, liberty or property, without due process of law;..."

The Federal National Mortgage Association Charter Act, Title 12, USCA § 1723a(d)(2) provides:

> "The board of directors of the corporation shall have the power to select and appoint or employ such officers, attorneys, employees and agents, to vest them with such powers and duties, and to fix and to cause the corporation to pay such compensation to them for their services, as it may determine; and any such action shall be without regard to the Federal civil service and classification laws. Appointments, promotions, and separations so made shall be based on merit and efficiency, and no political tests or qualifications shall be permitted or given consideration. Each officer and employee of the corporation who is employed by the corporation prior to January 31, 1972, and who on the day previous to the beginning of such employment will have been subject to the civil service retirement law

(subch. III of ch. 83 of Title 5) shall, so long as his employment by the corporation continues without a break in continuity of service, continue to be subject to such law; and for the purpose of such law his employment by the corporation without a break in continuity of service shall be deemed to be employment by the Government of the United States."

Title 5, USCA §8336 (d) provides:

"An employee who is separated from the service-

(1) involuntarily, except by removal for cause on charges of misconduct or delinquency; or

(2) voluntarily, during a period when the agency in which the employee is serving is undergoing a major reorganization, a major reduction in force, or a major transfer of function, as determined by the Office of Personnel Management, and the employee is serving in a geographical area designated by the Office;

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity."

Title 29, USCA § 623 provides:

(a) Employer practices

"It shall be unlawful for an employer-

(1) ...to discharge any individual or otherwise discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's age;"

(f) Lawful practices;
"It shall not be unlawful for an employer, ...

(2) to observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;"

Title 29, USCA § 631(a) provides:

"The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age."

Title 29, USCA § 626 provides:

(c)(1) "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter:.."

(d)"No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment

Opportunity commission. Such a charge shall be filed-
(1) within 180 days after the alleged unlawful practice occured;"

Federal Rules of Civil Procedure, 28

USCA - Rule 8 provides:

(a) (2) "a short and plain statement of the claim showing that the pleader is entitled to relief",
(e) (1) -"No technical forms of pleadings - are required",
(f) "All pleadings shall be construed as to do substantial justice".

EXECUTIVE ORDER NO.11141
Feb. 12, 1964, 29 F.R. 2477
DISCRIMINATION OF THE BASIS OF AGE
by President Lyndon B. Johnson

WHEREAS the principle of equal employment opportunity is now an established policy of our Government and applies equally to all who wish to work and are capable of doing so; and

WHEREAS discrimination in employment because of age, except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement, is inconsistent with that principle and with the social and economic objectives of our society; and

WHEREAS older workers are an indispensable source of productivity and experience which our Nation can ill afford to lose; and

WHEREAS President Kennedy, mindful that maximum national growth depends

on the utilization of all manpower resources, issued a memorandum on March 14, 1983, reaffirming the policy of the Executive Branch of the Government of hiring and promoting employees on the basis of merit alone and emphasizing the need to assure that older people are not discriminated against because of their age and receive fair and full consideration for employment and advancement in Federal employment; and

WHEREAS, to encourage and hasten the acceptance of the principle of equal employment opportunity for older persons by all sectors of the economy, private and public, the Federal Government can and should provide maximum leadership in this regard by adopting that principle as an express policy of the Federal Government not only with respect to Federal employees but also with respect to persons employed by contractors and subcontractors engaged in the performance of Federal contracts:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States and as President of the United States, I hereby declare that it is the policy of the Executive Branch of the Government that (1) contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement or discharge of employees, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or

statutory requirement, and ..."

Title 24 Code Federal Regulations Ch. III Subchapter A part 300 provides:

§300.3 "The Government National Mortgage Association (hereinafter in this chapter called the Association)"

§300.5 "The Association is a Government corporation in the Department of Housing and Urban Development..."

§300.9 "The Association directs its operations from its office located at 451 Seventh Street SW., Washington, D.C. 20414. It has made provisions for the carrying on of such operations through the Federal National Mortgage Association (FNMA). The regional offices of FNMA are listed below:
Atlanta, Ga. 30303, 34 Peachtree Street NE: ..."

STATEMENT OF THE CASE

i.

Course of Proceedings, Dispositions In The Courts Below, and Calhoun Proceedings.

Walter W. Calhoun instituted civil action against Defendant Federal National Mortgage Association (FNMA) on July 8, 1983 in United States District Court for the Northern District of Georgia, Atlanta Division, charging violations of the Age Discrinination In Employment Act (Title 29, Section 621, et seq., USCA) [R. 1-1], and a pendent claim under OCGA §34-1-2 for wrongful discharge. The District Court dismissed Calhoun's pendent claim under OCGA §34-1-2 [R. 1-12].

After completion of discovery Summary Judgment was granted on March 26, 1985 to Defendant as to the remaining claims asserted by Calhoun [R. 3-61]. No appeal was taken by Calhoun therefrom.

ii.

Petitioner's Complaint.

Meanwhile, on November 15, 1983 George H. Kasper, Jr., had moved for leave to intervene in the action [R.1-11] which was allowed [R.1-29], and simultaneously therewith filed complaint [R.1-11] asserting three causes of action, viz:

1] Age Discrimination In Employment Act, supra;

2] Pendent jurisdiction under Georgia Prohibitation of Age Discrimination In Employment Statute [OCGA §34-1-2].

3] Federal National Mortgage Association Charter Act [Title 12, Section 1716, et seq., USCA].

In capsule form the complaint alleged Petitioner was, after 16 years experience in private law practice, appointed by defendant in 1965 to a position as career attorney, thereafter promoted in 1967 to Assistant Agency Counsel, then in 1977 to

Southeastern Regional Counsel, which position he held until July 22, 1982 when he was "relieved of his responsibilities as Southeastern Regional Counsel." He was advised by the newly employed 34 year old Regional Vice President that his services were no longer required [R.1-11]. Subsequently the position was filled by a person only 31 years of age from outside FNMA who had been a licensed attorney for only some three years. [R. 1-11].

On October 4, 1982 Petitioner was transferred as Assistant Regional Vice President- Counsel, Grade 84, from Cost Center 16 to Cost Center 11. He remained in FNMA employment as Asst. Reg. V. P.- Counsel, at one-half pay from August 8, 1982 to August 5, 1983 at which time his employment was involuntarily terminated with the only reason given as "Discontinued Service Retirement". [R. 1-11].

On August 5, 1983 Petitioner was 57 years of age. The written employment evaluations given by his superiors were rated as superior to exceptional (the highest obtainable) for over 17 years. Despite his protest and queries as to his status, he was never given any reason or explanation for his removal, and replacement as SE Regional Counsel and his ultimate termination of employment.

That his employment with FNMA was subject to the "merit and efficiency" provisions of the Charter Act and that he was unreasonably and arbritrarily deprived of "Due Process" in violation of the law and of his rights, has suffered monetary damages for loss of compensation, terms, conditions and privileges of employment and reduced retirement and pension benefits. That he has not been dealt with fairly, justly or in good faith and offered no other position with

Defendant, and had been advised that he is not eligible for rehire. Following his termination on August 5, 1983 he was awarded reduced retirement benefits by the United States Civil Service Commission [R. 1-11].

Petitioner further alleged compliance with the provisions of the ADEA by filing charges (on August 24, 1983) with the Secretary pursuant to 29 USC § 626(d). Charges made to the EEOC stated, inter alia [R. 2-45 Attachment G]:

> "I charge Age Discrimination in FNMA's acts of July 22, 1982, in their refusal to provide "Due Process" and to give me a final decision on my appeals until August 5, 1983, and in my involuntary retirement of August 5, 1983."
>
> "I further charge Age Discrimination to me in my forced involuntary retirement as a Civil Service employee on August 5, 1983 - ".

Defendant answered asserting numerous defenses [R. 1-32] including late filing of charges with the EEOC [R. 1-32-2], and following discovery filed Motion For Summary Judgment and Judgment on the Pleadings which the District Court granted as to Petitioner's Second and Third Causes of Action [R. 3-56]. The Court, however, in the same order held Petitioner was entitled to be heard as to whether there may have been Equitable Tolling of his First Cause of Action, as "Kasper's affidavit is sufficient to show a genuine issue of material fact as to whether the defendant misled him regarding his employment status with FNMA." [R. 3-56].

There was additional discovery following which defendant filed a Second Motion For Summary Judgment [R. 4-87]. Same came on for oral hearing on May 6, 1986 and after brief oral argument the Court granted

defendant's Second Motion for Summary Judgment [R. 4-93] for reasons stated in open Court [R. 5]. Appeal to the Eleventh Circuit Court of Appeals followed. After Judgment of the Court of Appeals, on August 3, 1987, Petitioner's Attorney of Record became hospitalized and Petitioner proceeded with Petition for Rehearing Pro Se. Petition for Rehearing was denied on October 26, 1987. I proceed herewith Pro Se, and beg the Court's indulgence.

The Court of Appeals affirmed the District Court as to the Second Cause of Action holding that the Georgia Prohibation of Age Discrimination In Employment Statute [OCGA § 34-1-2] provided "No Private Right of Action" under OCGA § 34-1-2. This Second Cause of Action is herewith abandoned.

iii.

Statement of the Facts.

FNMA has largely ignored and managed to evade Petitioner's two affidavits and ATTACHMENTS [R. 2-45 2/18 and R. 4-90] in response to Defendant's Motions for Summary Judgment and for Judgment On the Pleadings. Petitioner deems it essential, under these circumstances, to include portions thereof for the Courts reference and consideration. These events and documents are summarized as concisely as possible, viz:

a] In November, 1968, Petitioner accepted, in writing, FNMA's offer of employment, contained in a letter from it's President, dated November 13, 1968, and the Memorandum from Secretary of Housing and Urban Development, Robert C. Weaver. [R. 2-45 - ATTACHMENT A]. Some of the terms are quoted for reference:

"That FNMA and GNMA shall provide by

contract for the conditions and methods by which FNMA may employ GNMA employees."

"The effect of the transfer on employees was a paramount consideration in the decisions reached on the agreement for transfer of functions and staff. I have felt, and the FNMA's Board of Directors and officers have shared my feelings, that employment conditions should not and need not be adversely affected by the transfer."

"Many of the provisions of the agreement are designed to assure maximum protection to employees,"

"You will, therefore, not lose your present retirement advantages, and will continue to be under the Federal retirement system, with FNMA making the employer contributions required under the system."

"Congress has asked us to develop a privately-owned corporation for the

public purpose of helping to provide a decent home in a decent environment for all Americans."

"As a private organization, FNMA will offer you a wider range of opportunities, greater benefits and more flexible employment policies than have been available under federal service.-- It is to your benefit, personally, to join the new organization."

"These policies have been developed with the objective of having the new FNMA's employment benefits equal to, if not better than, existing ones."

"FNMA is an Equal Employment Opportunity employer. In addition, since FNMA employees will be doing federal work on contract, the safe-guards about Equal Employment under the Federal Contract Compliance law will apply."

"FNMA will operate on the principle that's spelled out in the FNMA Charter

act (Section 309d.2):"

"Appointments, promotions, and separations-- shall be based on merit and efficiency, and no political test or qualifications shall be permitted or given consideration."

"This law will be carried out."

"A. Promotions from within Will be FNMA's basic policy. Thus FNMA will not seek employees elsewhere until existing personnel have been reviewed for their qualifications, including their potential after a reasonable amount of retraining. The policy of giving preferential treatment to existing employees is based on management's appreciation of loyalty and its desire to assure reasonable job security."

"D. Grievance & Separation Review Procedures will be established, whereby employees can request decisions be reviewed by supervisors at least two

levels above their immediate supervisor. An employee may be separated for inefficiency or cause when his work does not meet FNMA performance standards after a reasonable orientation period, or because he impedes or harms FNMA operations some other way."

b] On November 10, 1981, FNMA established Policy and Operating Manual Section 311-10, Subject - Termination of Employment [R. 4-5- ATTACHMENT S], Provides in part:

"SEPARATION FOR CAUSE: SEPARATION AUTHORITY -- The authority to separate an employee for cause up through salary range 60 is vested in the appropriate department or office head, Regional Vice President, or Director of Auditing. The separation of all other employees for cause requires the approval of the Chairman and in the case of an Officer, the Board of Directors."

Petitioner was salary range 84, Assistant Regional Vice President-Counsel (officer). This Policy and Operating Manual procedure was not followed as to Petitioner.

c] On about the second week of July, 1982 Ms. Caryl Bernstein, Executive Vice President, General Counsel and Secretary visited the Atlanta, Legal Division office and congratulated us on "our good work". [R. 2-45-2].

d] On July 22, 1982 FNMA promulgated memorandum "subject: Employment relations" which established procedures for employee Due Process, Termination, etc. [R. 2-45 ATTACHMENT Q]. This procedure was not followed as to Petitioner. He received a copy on September 20, 1984, as a part of discovery [R. 2-35-18]. It provides:

"DUE PROCESS (for employers)

-clear policies, procedures standards

-discipline is progressive

-actions are uniform according to

violation/problem resolution

-documentation includes signatures of both parties"

"STEPS TO FOLLOW

-standards of conduct are clearly published (see misconduct, page 42)

-performance standards and measurement criteria are established

-verbal warning/statement of deficiency given

-written documentation & counselling interview occur

the counselling interview should include:

1. statement of problem based on observed conduct/performance and resulting job interference
2. employees statement of problem
3. required action/improvement with specific time frame and follow up

-prompt follow up"

"TERMINATIONS

Suggestion: Create resignation form that includes the following:

I hereby resign my position as (title) for ABC Company, effective (date). I have no claims or grounds for any claims against the company based on my period of employment with the organization. This should be signed, dated and witnessed."

e] On July 22, 1982, newly employed 34 year old Regional Vice President Glenn T. Austin, Jr., relieved Petitioner of his responsibilities as Southeastern Regional Counsel advising him that his services were no longer required and to contact Al Burfeind, Vice President in the Washington office. Petitioner was shocked and asked him "What was wrong? What have I done? What have I failed to do?" He gave no reason whatsoever. [R.

2-45-2].

f] On July 22, 1982 Petitioner called Ms. Bernstein in Washington and told her what Mr. Austin had told him. She expressed no surprise. Petitioner asked "What was going on? What was wrong with his work as Regional Counsel?" She gave no reply. [R. 2-45-2].

g] On July 22, 1982 Petitioner called Mr. Burfeind in Washington and told him what Mr. Austin had told him. He said that with 17 years service FNMA would provide one-half year pay as severance. Petitioner advised that this was not acceptable and that he had 19 years service. Burfeind said that he would look into the matter and call back. [R. 2-45-3].

h] On July 23, 1982 Petitioner called Burfiend again. Burfeind said that "maybe we can get a retirement out of this in August 1983". Petitioner advised that he did not want to retire at his age

and that he could not support his family on one-third pay. This was not a RIF. They discussed FNMA's policy of transfer and in view of Petitioner's superior to exceptional performance and since he enjoyed his job that Burfeind would contact Petitioner's previous superiors about recommendations of transfer, and try to find out "what was going on", and that he would be Petitioner's "advocate". Burfeind said "Don't worry, I'll take care of things and call you at home next week".[R.2-45-4].

i] On July 23, 1982 Petitioner vacated his office as SE Regional Counsel as he had been instructed to do. Since Burfeind was looking into the transfer he wanted to be on good working relations with FNMA as Al was "working things out". [R. 2-45-6].

j] Possibly a week later Burfeind called Petitioner at home and said that he was working on a plan that could string out

the half year pay and get 20 years of Civil Service time. Petitioner said "Al, wait a minute. I told you that I didn't want to retire". Burfeind said that he was looking into the transfer, but that he would have to work up a memorandum for the Controller concerning Petitioner's pay, and would call back later. [R-2-45-6].

k] Burfeind called Petitioner a few days later and said that he was working on a memorandum providing for "Continuing Employment Arrangements". Petitioner advised Burfeind that he still did not understand how he would become eligible to retire and said "Al, I still don't want to retire, as I have told you." The transfer situation was again discussed. The "time and attendance report" was discussed. It was Petitioners impression that he was and would continue to be a FNMA employee, however unassigned, until an appropriate position could be found.

Petitioner continued to have positive feelings about the transfer until March and April, 1983, and remained available to consider such assignment as FNMA offered. [R. 2-45-7].

l] Petitioner received copy of the memo to Files a few days later, and was never asked to sign or approve it. The memo was twice amended by Burfeind [R 2-45-7 ATTACHMENT B].

m] On October 4, 1982 Petitioner was transferred ARVP-Counsel, Level 84, from cost center 16 to cost center 11, although Petitioner was not advised. [R. 2-45 - ATTACHMENT P].

n] On January 28, 1983 Petitioner's replacement Judith Dedmon, wrote Caryl S. Bernstein, "George Kasper has not been terminated; he will be on the payroll until August 5, 1983.-" [R. 4-90-ATTACHMENT T].

o] In a letter dated February 3, 1983 David O. Maxwell, Defendant's Chairman of the Board, advised Senator Sam Nunn that Mrs. Bernstein and Mr. Austin had "decided that it would be appropriate to relieve Mr. George Kasper of his responsibilities as Regional Counsel -" [R 2-45 - ATTACHMENT D].

p] In the latter part of March 1983, Petitioner felt, for the first time, that perhaps FNMA had discriminated against him on the ground of age in being removed as SE Regional Counsel, after he met with Mr. Calhoun and saw the letter from Mr. Maxwell to Senator Nunn, saw Mr. Calhoun's EEOC complaint, and what FNMA was doing to other employees, found out that his replacement was admitted to the Georgia State Bar on February 1, 1980 (two and one-half years in place of the POM mandatory five year qualification), and talked to Mr. Hunter on March 25, 1983.

[R. 2-45-9, 10, 11 & 15].

q] On March 25, 1983 Petitioner telephoned Mr. Oakley F. Hunter, former Chairman and then member of the Board of Directors of FNMA attempting to determine his employment status and what the new FNMA was doing to him. Petitioner told him that Mr. Burfeind kept promising that he was going to help arrange a transfer, but that he was beginning to feel that he was "just stringing me along". Mr. Hunter said "No, Al is not going to help you a bit. I have had a number or other employee problems like yours, that I have talked to Al about. He won't do you any good". Mr. Hunter suggested that Petitioner write him a letter that he could present to the Board since they have all sorts of provisions for supplemental annuity. The letter was written on March 26, 1983. [R. 2-45-10].

r] On April 15, 1983 Petitioner telephoned Mr. Hunter again and was told that the committee had not met [R.2-45-11].

s] In order to mitigate his damages, on May 1, 1983 Petitioner entered the employ of Federated Financial Corporation as General Counsel, having performed some consulting services for it during April, after having informed it's President Mr. Gary Jones "of my employment with FNMA, and that if they called I would have to go." However, by this time Petitioner had concluded that Mr. Burfeind and FNMA had "just been playing games with him" and did not intend to transfer or reassign him. [R. 2-45-11].

t] On June 16, 1983 Petitioner wrote Mr. David Maxwell, Chairman of the Board of Directors, FNMA, and enclosed copy of letter written previously to Mr. Hunter [R. 2-45-11,12]. This letter was acknowledged by Mr. Robert J. Mylod,

President of FNMA, stating he was looking into the matter [R. 2-45-12].

u] Neither Regional Vice President Glen Austin, nor Vice President A. F. Burfeind had authority to terminate the employment of Petitioner,grade 84, and an officer, without the approval of the Board of Directors. [POM-311-10] - [R. 4-90 - ATTACHMENT S].

v] Petitioner never recognized either Austin or Burfeind as having authority to terminate his FNMA employment, absent approval of the FNMA Board of Directors, and he contacted both Mr. Hunter and Mr. Maxwell [R. 2-45].

w] On July 26, 1983 Petitioner received a telephone call from Caryl S. Bernstein, stating that she was calling in response to Petitioner's letter to Mr. Maxwell [R. 2-45-12]. In a lengthy conversation between Petitioner, his attorney and Ms. Bernstein and Mr. Burfeind, it was

discussed that the proposal and offer of early retirement "was not acceptable and had never been acceptable as I had told Mr. Burfeind". A discussion was had about what Petitioner would consider to be fair enough to encourage him to accept an early FNMA retirement, and FNMA's policy of supplementing Civil Service retirement pay by 2% per year was discussed. Ms. Bernstein said "if we agree to that and send you a release, will you sign it?" Ms. Bernstein stated that she was going to be on vacation and at the American Bar Association meeting but that she would see what could be worked out and contact Petitioner in a few days [R. 2-45-13].

x] Between July 22, 1982 and August 9, 1983 there had been approximately nine (9) telephone conversations between Petitioner and Mr. Burfeind concerning employment status, transfer, eligibility and retirement [R. 2-45].

y] On August 10, 1983 Petitioner received from Ms. Bernstein letter stamp dated August 5, 1983 but postmarked August 8, 1983 declining to grant any relief [R. 2-45-13 - ATTACHMENT E].

z] Mr. Burfeind did not contact Petitioners previous supervisors as requested, pertaining to his performance concerning FNMA policy of transfer. Therefore, Petitioner obtained letters of recommendation from them for use of Mr. Burfeind, and as needed [R. 2-45].

aa] On August 12, 1983 Personnel Action terminating Petitioner from the position of Assistant Regional Vice President-Regional Counsel for reason "Discontinued Service Retirement" not eligible for rehire was promulgated [R. 2-45 - ATTACHMENT F].

bb] Civil Service Retirement Documents were prepared by Defendant, dated for most part on August 29, 1983 and

indicating "Involuntary Discontinued Service Retirement", showing date of separation 8-5-83, were signed by Petitioner providing "This application is submitted subject to my charges of Discriminatory Practices filed with the EEOC". [R. 2-45 ATTACHMENTS H, I, J and K].

cc] Separation Notice was furnished State of Georgia by Defendant, dated August 19, 1983, indicating period of last employment "From 12-13-65 to 8-5-83". [R. 2-45 - ATTACHMENT M].

dd] Petitioner was never provided with any reason or explanation for the action being taken against him by FNMA (not even a reply to the EEOC complaint) and has been deprived of "due process" by FNMA [R. 2-45].

ee] Petitioner was not informed that FNMA had a plan to involuntarily (mandatorily) retire him, when he became eligible for early reduced retirement

annuity, until August 12, 1983, when he was advised that he had already been involuntarily retired on August 5, 1983. [R. 2-45- 13, 14].

ff] August 24, 1983 EEOC charges alleged:

1. Age discrimination in FNMA's actions of July 22, 1982,

2. Refusal to provide "due process",

3. Age discrimination on August 5, 1983, in involuntary dismissal and forced retirement, and

4. Forced involuntary retirement as a civil service employee on August 5, 1983.

Discovery included three depositions of Petitioner: first in Mr. Calhoun's case, the second of March 14, 1984 is substantially in accord with affidavit in response to Motion for Summary Judgment [R. 2-45], although more detailed and the third deposition from Petitioner was secured on February 20, 1986 [R. 5]. The third deposition developed, inter alia,

Petitioner's employment with Federated Financial had terminated by the position being eliminated [R. 5-0-18], detailing efforts made to find other employment [R. 5-0-19/28], and that he had entered private law practice four or five days previously [R. 5-0-17]. On two occasions, the first being the latter part of 1982, he had visited the SE Regional office of Defendant and saw his replacement, Miss Judy Dedmon there [R. 5-0-33]. He did receive Personnel Action notice of involuntary retirement discontinued service effective August 12, 1983 and has been receiving reduced retirement benefits. He does not know what the discontinued service provisions of the Civil Service Retirement is, and it has never been explained to him although explanation requested [R. 5-0-12], and he knows of no other person who has ever been so terminated. [R. 5-0-37].

Mr. Glenn Austin, in deposition of May 7, 1984, recounting the events of July 22, 1982 [Deposition pp 88, 89] recalled he stated inter alia "---What I was going to tell him didn't relate to him as a person or as a professional, --- that we were moving in a new direction --- Fannie Mae --- certainly it was my desire for us to move in a new direction within the Southeastern Region of Fannie Mae, and that it was my preference to have someone else in the position of Regional Counsel, and that I would appreciate his cooperation in that regard--". "It was a very gentlemanly meeting." He agreed Petitioner expressed surprise, and asked "What have I done?", and also at least the gist of another question "What have I failed to do?" And at [Deposition p 135] commenting on the Policy and Operating Manual said "I would have to say that less and less emphasis has been placed on that

Manual in recent years, and that it's very much out of date. And there are many, many areas of our operations that are not governed, put that in quotes, by the POM, as it used to be called."

In deposition of December 15, 1983, Executive Vice President, and FNMA General Counsel Bernstein, commenting on the Policy and Operating Manual [Deposition pp 61,62] stated "It's three very -- at least three very thick looseleaf volumes that governed all sorts of things. When the new management came in, we basically took a less-structured approach perhaps and didn't treat the POM's always as the last word on everything."

STATEMENT OF STANDARDS OF REVIEW IN THE LOWER COURT

Dismissals on the pleadings, or for failure to state a claim upon which relief can be granted: Federal Rules of Civil Procedure, 28 USCA - 8:

> "(a) (2) a short and plain statement of the claim showing that the pleader is entitled to relief",
> "(e) (1) - No technical forms of pleadings - are required",
> "(f) All pleadings shall be construed as to do substantial justice".

All material facts alleged in the complaint are considered true and construed in favor of complaining party. Conley v. Gibson, 355 U.S. 41, 45-46. 78 S. Ct. 99, 102, 2 L. Ed. 2d 80(1957). "Pleadings should be liberally construed" Beacon Theatres v. Westover, 79 S. Ct. 948.

A complaint is sufficient if it sets forth facts which show that plaintiff is entitled to any relief which the court can grant, regardless of whether plaintiff has asked

for the proper relief. Keiser v. Walsh, 1941, 118 F2d 13, 73 App. D.C. 167.

Summary Judgment may be granted only if there is no dispute as to any material fact. All reasonable doubts about the facts resolved in favor of the non-movant. Fountain v. Filson, (1949, 69 S. Ct. 754, 336 U.S. 681, 93 L. Ed. 971, rehearing denied.

> "It is well-settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test-'no genuine issue as to any material fact-- is satisfied and that he is entitled to judgment as a matter of law. The movant is held to a stringent standard. Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existance of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and he is given the benef[illegible]f all favorable inferences that can b[illegible]wn from it. Finally, facts assert[illegible] the party opposing the motion if supported by affidavits or other evidentiary material, are regarded as true." Coke v. General Adjustment Bureau, Inc., (en banc), 640 F. 2d 584, 595 (5th Cir. 1981).

ARGUMENT

FIRST QUESTION - FNMA has used the availability of the Civil Service early retirement law providing for annuity with 20 years of service after 50 years of age as a means and method of involuntarily, mandatorily retiring Petitioner two days after FNMA had created 20 years of service.

McCorstin v. United States Steel Corp. 621 F.2d 749 (5th Cir. 1980) at p. 755:

> "Permissive early retirement is a laudable attempt to provide security for those who are unable or disinclined to continue to work to the mandatory or normal time for retirement. These programs, however, cannot be a basis or factor for a discharge decision. see Hannan v. Chrysler Motors Corp., 443 F.Supp. 802 (E.D. Mich. 1978)."

Also: Maxfield v. Sinclair Intern. 766 F.2d 788 (3rd Cir. 1985). Mason v. Lister 562 F.2d 343 (5th Cir 1977) upholds the legality of the Federal early retirement scheme and at p. 346:

> "Here the retirement scheme established under 5 U.S.C.A. § 8332(d)(2) could not be a subterfuge because it is strictly optional with the employees. It does

not give the government the power to forcibly retire older workers, and does not conflict with the Congressional goal of promoting 'employment of the older persons based on their ability rather than age'. 29 U.S.C.A. §621."

Retirement under 5 U.S.C.A. § 8336(d)(2) is strictly optional with the employee and its use by FNMA to forcibly retire Petitioner conflicts with the purpose and intent of the law. FNMA has not attempted to show that Petitioners forced early mandatory retirement was for some economic or business purpose other than age discrimination.

E.E.O.C. v. Baltimore and Ohio R. Co. 632 F.2d 1107 (4th Cir. 1980) holds:

"Where there was no authority in pensions plans to involuntarily retire employees prior to age 65, the plans did not provide a defense to prima facie violation of the Age Discrimination in Employment Act in involuntary retirement of employees aged 60 to 65, even though such employees then qualified for pension benefits." and "If such discharged employees were entitled to a pension, the right was earned by service to the railroad companies and was vested despite discharge, not because of it."

FNMA contends that Petitioner was told in August 1982, that he was to be retired in August 1983, therefore his EEOC claim filed on August 24, 1983 was untimely.

Schellfeffer v. United States, 343 F.2d 936 (1965) at p. 937 holds:

> "'Retirement' comes when individual is ready for immediate annuity, not before, within provisions of Federal Employees Retirement Laws. Act June 25, 1958, § 1(a), 72 Stat. 218."

It was not the offer, proposals and discussions, from July 1982 to July 1983, of the early civil service retirement plan that was the unlawful act. The unlawful act occured when FNMA involuntarily retired Petitioner against his will in August 1983, when he became eligible for immediate annuity.

FNMA is in prima facie violation of the ADEA, in forcing Petitioners early mandatory retirement at age 57 with 20 years service under 5 U.S.C.A. § 8336(d)(2). Petitioners EEOC complaint was timely.

SECOND QUESTION - Although FNMA stock is privatley owned, FNMA was created by Congress to "relieve budgetary constraints" with a "public purpose" and is engaged in extensive "Federal Action" in its employment relations with Petitioner.

There are at least three types of FNMA employees, viz:

1] Government Civil Service employees who transferred from GNMA pursuant to written contract in November 1968.

2] Government Civil Service employees who transferred pursuant to the Charter Act after 1968 but before January 31, 1972.

3] Private employees employed by FNMA after December 1, 1968.

Petitioner is in the first type.

Petitioner has urged the holdings of Northrip v. Federal National Mortgage Association, 527 F.2d 23, 31 (6 Cir. 1974) as being instructive and applicable:

"Before the reorganization of FNMA

its employees were government personnel within the Department of Housing and Urban Devolopment, and therefore were covered by civil service requirements and retirement laws. To protect employee benefits that had accumulated, the statute provided for continuation of their participation in the system as long as they remained employees of FNMA. However, all employees hired after 1968 became employees of the corporation and are not subject to the civil service laws." 12 U.S.C. § 1723a(d)(1).[6]"

12 U.S.C.A. § 1723a(d)(2) provides:

"Appointments, promotions and separations so made shall be based on merit and efficiency,-- Each officer and employee of the corporation who is employed -- have been subject to the civil service retirement law -- shall -- continue to be subject to such law; and for the purpose of such law his employment by the corporation without a break in continuity of service shall be deemed to be employment of the Government of the United States."

In its Judgment of August 3, 1987, the Court, in referring to Northrip, at p. (A-30)states:

"The Sixth Circuit mistakenly referred to 12 U.S.C.A. § 1723a(d)(1) as applying to FNMA, rather than GNMA; therefore, Northrip is not controlling in this case."

It is pointed out that where this code

section is used in Northrip at page 31, it refers to footnote "6".

> "6. For a more detailed analysis of FNMA, its predecessor and its counterpart, GNMA, see --."

We respectfully submit that Northrip did not confuse "Federal Action" of GNMA employees with the "Federal Action" of FNMA employees. All GNMA employees are government (within the Department of HUD) whereas Northrip recognized the government status of some FNMA employees. (emphasis supplied). Northrip at p. 31:

> "There is some, and perhaps even significant, government involvement in, the regulation of the working of FNMA, -- the government status of some of its employees -- amounts to at least some state involvement in the operations of FNMA's business." also
> "When private corporations are endowed by the state with functions or powers of a governmental nature, they become instrumentalities of the state and are subject to its constitutional limitations."

Palmer v. Columbia Gas of Ohio, 479 F.2d 153, modified by Turner v. Impala Motors, 503 F.2d 607 (6 Cir. 1974) and Evans v.

Newton 382 U.S. 296, 299, 86 S.Ct. 486, 15 L. Ed. 373 (1966).

Northrip also provides a detailed discussion on "Federal Action" and "close nexus between the State and the challenged actions of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345 at 351, 95 S.Ct. at 453, 42 L. Ed2 477 (1974).

That FNMA is a federal instrumentality: Federal National Mortgage Association v. Lefkowitz, 390 F.Supp 1364 (S.D.N.Y. 1975). Isaac & Assoc. v. Federal National Mortgage Association, 647 S.W. 2d 495 (Ky. App 1982) finding that federal action was involved when FNMA terminated service contract with mortgage banker thereby requiring due process hearing. at p. 496:

> "that FNMA was a federal instrumentality and that its actions in terminating the contract herein was 'federal action.'

> This means that FNMA was required to give due process hearing to the appellant under the federal and state constitutions."

FNMA and its employees are extensively envolved in "Federal Action" in carrying on the operations of GNMA, doing federal work on contract under the Federal Contract Compliance law [Title 24 Code Federal Regulations ch III Subchapter A part 300] and are entitled to the safe-guards about Equal Employment Opportunity (separate and apart from the ADEA). FNMA is involved in "Federal Action" in its administration of the federal civil service program, its retirement laws and in the Early Retirement Plan applicable to its government employees who transferred by contract in 1968, so as to require FNMA to provide "due process" pursuant to FNMA established procedures to Petitioner.

THIRD QUESTION - In applying the four-factor test announced in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and holding that Petitioner had no private right of action thereby dismissing the third cause of action, the Courts have overlooked the critical facts, that: Petitioner, having entered the employ of FNMA in 1965 - prior to the adoption by Congress of the Charter Act - was a government employee and not merely an employee of a private Corporation, and further that the transfer in 1968 was by contract incorporating the provisions of the Memoranda dated November 13, 1968 of Secretary of HUD Weaver and FNMA President Lapin. The contract rights are basic.

Petitioner contends that the lower Courts have misapprehended the law and misapplied the FNMA defense of "No Private Cause of Action Granted in the FNMA Charter Act", as to its application to the facts

of this case. Petitioner contends that Cort, as modified, is not applicable.

Congress directed Secretary Weaver, under the circumstances of the Act, to implement the transfer of functions and staff, and the employment conditions by which FNMA could be immediately staffed by hundreds of experienced government mortgage employees from GNMA. To encourage GNMA employees to accept transfer to FNMA, the Memoranda outlined the contractual provisions, assuring government security and greater opportunity. The memoranda were attached to Petitioner's affidavit of September 20, 1984. Petitioner was required to, and did accept these contractual provisions in writing. Secretary Weavers implementation of the procedures for the transfer of functions and staff, pursuant to the Act, are circumstances of its enactment and form a part of the legislative intent and history which show

Congressional intent to protect those rights of "the class" by cause of action.

Secretary Weaver assured:

> "The effect of the transfer on employees was a paramount consideration in the decisions reached on the agreement for transfer of functions and staff."

TransAmerica Mortgage Advisors v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), discussing Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) and Cort. holds:

> "This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to made such a remedy available. Cannon, supra, at 694. Such an intent may appear implicitely in the language or structure of the statute, or in the circumstances of its enactment."

The contract of employment incorporated terms and assurances of the memoranda including:

1] Safe-guards of Equal Employment under Federal Contract Compliance law prohibiting age discrimination, providing for

employment based on merit alone, ordered by President Johnson on February 12, 1964 in Executive Order No. 11141.

2] The provisions of the Civil Service retirement laws (subch. III of Ch. 83 of Title 5) so long as employment continues without a break in continuity of service.

3] The FNMA Charter Act providing employment based on "merit and efficiency" and

4] The other agreements and assurances, that: employment conditions should not be adversely affected by the transfer, provisions designed to assure maximum protection to employees, continued present civil service retirement advantages, benefits equal to if not better than existing ones, promotions from within and separations only "for cause".

Presidential Executive Order and regulations issued pursuant thereto carry force and effect of law. Vitarelli v. Seaton 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012(1959).

The FNMA POM providing "Separation for Cause Authority" requiring approval of the FNMA Board of Directors to separate Petitioner was not followed.

FNMA Memorandum "Employment Relations" established procedures for "due process" and "terminations" required procedures and standards with documentation signed by both parties, progressive discipline, verbal warnings, counselling, suggested form for resignation to be signed and witnessed. This procedure was not followed.

Petitioner has a "legitimate claim of entitlement to continued employment" until removed in accordance with established procedure and right of action under the contract incorporating the Charter Act, Civil Service Regulations, and the POM.

Rights of "due process" and "legitimate claim of entitlement to continued employment" until removed in accordance with

established procedures, is stated in Doe v. Casey, 601. F. Supp 581, (D.C. Dist C.1985):

> "When a government agency promulgates and establishes regulations conferring procedural due process rights on its employees, it must adhere to its promulgated rules to avoid any injustice even though they may not be statutory or constitutional requirements. (Cits.)"

Paige v. Harris, 584 F.2d 178 (7 Cir. 1978), and Ashton v. Civilette, 613 F. 2d 923 (App. D.C. Col. 1985) support the holdings of Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694 (1972), Services v. Dulles, 354 U.S. 363, 77 S.Ct. 1152 (1957) and Vitarelli, supra, at p. 976:

> "An executive agency must be rigorously held to the standards by which it professes its actions to be judged."

Paige, supra, at p. 181:

> "In Board of Regents v. Roth, 408 U.S 564, 92 S.Ct. 2701, 33 L.Ed.2d 548)1972), the Supreme Court concluded that no entitlement (and therefore no property interest) existed for a non-tenured college professor. However, such an entitlement to continued employment may be created by statute or contract. See Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). In the

companion case to Roth, Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 970 (1972), the Supreme Court held that a cause of action was presented by a college professor's contention that he had been denied due process by a decision not to renew his contract. Sindermann had been employed by the college for four years and the Court concluded that he might be able to show

> "the existance of rules and understandings, promulgated and fostered by the state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'." Id. at 602, 92 S.Ct. at 2700."

"However, as indicated in Perry, a property interest may be conferred by the terms of employment."

"as such, 'property interest can result from implied agreements or statutory or administrative procedures governing nonrenewal'."

"The principle that under the Due Process Clause an individual must be given an opportunity for a hearing before he is deprived of any significant property interest, requires 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L. Ed2d 494 (1985).

Petitioner was deprived of "Due Process" in violation of the U. S. Constitution.

FOURTH QUESTION - Without conceding that Petitioner ever had any rights as a government employee, FNMA contends that Petitioner lost any rights which he may have had in the FNMA transition. The period of transition allowing the stock to become privately owned did not divest the government civil service employees who transferred of any rights. As long as their service continued without a break in service, they shall be deemed to be employees of the Government of the United States and subject to such law.

The actions of the new FNMA management amount to a substantial, adverse reduction and deprivation of the employment rights which those government employees possessed prior to their acceptance of transfer pursuant to the memoranda contract of employment incorporating the Charter Act. FNMA's actions are in violation of the circumstances of the FNMA Charter Act, the

representations, assurances and covenants of the contract as well as the FNMA POM:

"merit and efficiency -- This law will be carried out. It will work, successfully, to your benefit -.", "employment conditions should not and need not be adversely affected by the transfer". "FNMA will offer you a wider range of opportunities, greater benefits", "FNMA employment benefits equal to, if not better than existing ones", "The policy of giving preferential treatment to existing employees is based on management's appreciation of loyalty and its desire to assure reasonable job security".

The government civil service employees were "grandfathered" into FNMA, pursuant to the contract and the Charter Act.

FNMA's roots and inheritance are deeply embedded in it's Government "public purpose". The new FNMA cannot deny and

disavow this heritage, responsibility and obligations in its pursuit to become a "totally private corporation", without accountability for its actions. Its "preferences" must yield to the "lawful rights" of others. FNMA cannot "pick and choose" which laws, regulations and contracts it will honor, because they are either "very much out of date", or because the new management "didn't treat the POM's always as the last word on everything" as "It's three very -- at least three very thick looseleaf volumes that governed all sorts of things".

FIFTH QUESTION - In its Order of May 6, 1986, the Court stated that in its view, July 22, 1982 was the date on which Petitioner's cause of action accrued as to removal as Regional Counsel, as it was the last date on which Petitioner performed any duties for FNMA. That the August 4, 1982 Memo to Files (not letter to Kasper) was the date Petitioner received "notice" of his termination on August 5, 1983 and the Court mentioned Petitioners attendance at a seminar on age descrimination, and that as he was an attorney he had failed to act in what the Court deemed due diligence.

Petitioner respectfully submits that Delaware State College v. Ricks, 449 U.S. 250, 66 L.Ed.2d 31, 101 S.Ct. 498 (1980) is distinguishable. [p. 257]:

> "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued, or occured at the time of the actual termination

of his employment. But the complaint alleges no such facts."

Petitioner's complaint does so allege.

Additionally, Ricks discloses:

1] The Board of Trustees of Delaware State College formally voted.

2] The trustees had plenary authority.

3] The Board clearly made and established its official position.

4] Ricks was formally notified of the Board's Official action.

5] Such Official Board position was made apparent and clear to Ricks, i.e. he was abundantly and unambigiously forewarned.

6] The Board carefully established procedures to insure fairness.

7] The policies and procedures so established were followed and adhered to.

8] The only alleged discriminatory act was denial of tenure.

9] Equitable tolling was not applicable or in anyway involved.

In distinguishing Ricks from this case:

1] Petitioner had government status.

2] Petitioner had contract of employment.

3] Early Civil Service Retirement is strictly optional with employee and FNMA is not given power to forcibily retire him.

4] The Memo to Files (for controller) provident "Continuing Employment Arrangements..", was not a future, authoritative, final, unambigious notice to Petitioner that he was to be forcibily retired.

5] Authority to terminate Petitioner's employment was vested in the FNMA Board of Directors. Neither Austin nor Burfeind had authority to terminate Petitioner as a FNMA employee.

6] Petitioner was never notified of any action by the FNMA Board of Directors, although he was in contact with the Board.

7] FNMA did not follow its employment policies, viz:

i] "due process"

ii] "Employment of merit & efficiency"

iii] "Promotions from within"

iv] "Equal Employment Opportunity"

v] "Transfer of location".

Although Rubin v. O'Koren, 644 F.2d 1023 (5 Cir 1981) involves a 42 U.S.C.A. 1983 action, it involves "due process" violation and in commenting on Ricks, Mr. Judge Hill said [p. 1026]:

> "In the case before us plaintiff's complaint, fairly read, alleges inter alia, that the defendants unlawfully failed to provide her with a hearing or notice of the charges that resulted in her dismissal. These alleged violations clearly continued until February 1977, when her dismissal was upheld by the university grievance committee."

Ricks involved an academic setting where only denial of tenure was involved, not termination of employment, and has no application to Petitioner's case.

SIXTH QUESTION- Summary Judgment should not be granted where there is a material issue of fact. Petitioners two affidavits, with supporting attachments, create issue of material fact. FNMA has effectively preempted Petitioner from a jury trial on the evidence by its argument contrary to these affidavits, viz: FNMA argues that Petitioners employment was terminated on July 22, 1982 by Austin, alternatively by Burfeind's Memo to Files as "notice" on August 4, 1982, that only one violation was alleged in the EEOC charge which was time barred and Petitioners gentlemanly conduct and his efforts to mitigate his damages amounted to his agreement or acquiescence in FNMA's treatment of him. Then FNMA implies that Austin acquired authority to terminate Petitioner because of deleterious[1] conduct: "as Kasper was not

1. Webster's Dictionary- deleterious: hurtful, destructive, noxious, pernicious.

an officer of FNMA, approval from the Board of Directors was not necessary to effectuate his termination. Even if he had been an officer, the manual authorized immediate termination by the Regional Vice-President where the employee's conduct is 'deleterious to the continued functioning of the unit'." This argument is not only contra to the evidence but prejudicial. However, obviously the argument "bore fruit".

Although Parker v. Federal National Mortgage Association, 741 F.2d 975 (7 Cir 1984) affirms FNMA on Summary Judgment (as to age not being a determining factor):

> "Summary judgment is an effective mechanism for preempting trial where there is no disputed issue of material fact."
>
> "Once the plaintiff presents the court with some evidence (that his employer harbored the prohibited motive) summary judgment for the defendant is inappropriate because there is a disputed fact material to the case."

Petitioner did what Parker did not do, He presented two lengthy affidavits with

many supporting ATTACHMENTS, which FNMA had not attempted to refute, but does argue against. When the project mortgage portfolio was transferred from Chicago to Atlanta, although Parker's performance was less than others retained, he was offered a transfer to Atlanta in January 1982, as was FNMA's policy, although FNMA refused to assign Petitioner.

The Court originally held that Petitioner was misled by FNMA as to the facts of his employment status (not misrepresentations of law) yet, later reversed holding that Petitioner, being an Attorney and attending a required continuing legal education seminar, on age discrimination in March 1983, should know the law and became time barred.

On equitable tolling and misrepresentation see: Ott v. Midland-Ross Corp., 600 F.2d 24 (6 Cir. 1979), and Meyer v. Riegel Products Corp, 720 F. 2d 303 (3 Cir 1983).

"We are directed to no case in which a court has used a tape measure to determine the magnitude of a potential misrepresentation and has then held that a big one tolls but a little one does not. (Cit.)."

"Here to, plaintiff did precisely what the Hart Court suggested: he asked defendants for an explanation of his dismissal."

Also: Goldstein v. Manhattan Industries, Inc., 758 F. 2d 1435 (11 Cir. 1985).

FNMA contends that Petitioner has agreed to FNMA's treatment and is waived and estopped to complain. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 89 L. Ed. 1297, (1944).

"Where a statutory right is conferred on an individual in the public interest to effectuate a legislative policy, it may not be waived or released by him."

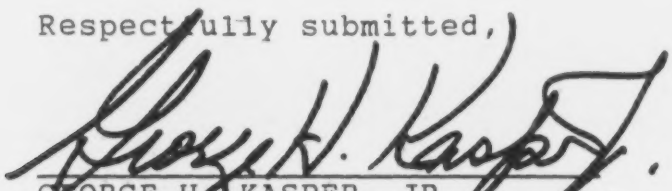
And: Alexander v. Gardner-Denver Co. 415 U.S. 36, 39 L Ed. 2d 147, 94 S.Ct. 1011, (1974).

"There can be no prospective waiver of an employee's rights under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), which requires equal employment opportunities."

CONCLUSION

Earnestly believing that the judgment of the Eleventh Circuit Court of Appeals is erroneous for each and all of the reasons hereinbefore stated, Petitioner requests reversal.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALTER W. CALHOUN,

Plaintiff,

vs.

GEORGE H. KASPER, JR., CIVIL ACTION

Intervenor, No. C 83-1437 A

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant.

O R D E R

In this action there is pending before the court and ripe for decision the defendant's motion for summary judgment and for judgment on the pleadings as to the intervenor's claims and the defendant's motion for separate trials. The defendant has also moved for summary judgment with regard to the plaintiff's complaint and amended complaint, but that motion is not ripe for decision at this time.

In his complaint George H. Kasper, Jr., the intervenor, asserts three claims: the first is under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., the second is under Georgia's Age Discrimination Statute, O.C.G.A. § 34-1-2, and the third is brought under the Federal National Mortgage Association Charter Act, 12 U.S.C. § 1723, et seq.

I. KASPER'S ADEA CLAIMS

It is undisputed that on July 22, 1982, Kasper, who at that time was Regional Counsel for FNMA, was informed by the regional vice president of FNMA that his "services were no longer required." Kasper did not file a complaint with the EEOC, a prerequisite to obtaining judicial relief under the ADEA, until August 24, 1983.

The ADEA provides that no civil action may be commenced by an individual until 60 days after a charge alleging unlawful

discrimination has been filed with the EEOC; the statute further provides that a charge must be filed with the EEOC within 180 days after the alleged unlawful practice occured. 29 U.S.C. § 626(d). Although the plaintiff continued to work for FNMA for a few days following the date he was informed of his termination and although he was continued on the payroll for several months thereafter (as a result of various negotions conducted between Kasper and FNMA), the 180 day filing period is triggered when an employee is notified of his termination and not by his last day of employment. Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498 (1980).

Kasper initially urges this court to allow him to rely upon the timely filing of a complaint with the EEOC by the plaintiff, Walter W. Calhoun, citing Shuster v. Federated Department Stores,

Inc., 508 F. Supp 118 (N. D. Ga. 1980). Shuster is inapposite. In Shuster the employees alleged that they were discharged from their employment on the same date and that they were so notified by the same employee of the defendant. The court noted that when the EEOC representative initially contacted the defendant's Director of Personnel and Employee Relations, his efforts to attempt reconciliation concerned both of the terminated employees. The court further noted that the inclusion of the employee who had not filed a timely charge in such conciliation efforts "in no way delayed or hampered the conciliation efforts ... by the EEOC, and the defendant was in no way prejudiced by Mr. Leff's failure to file a timely charge." 508 F. Supp. at 121.

In the instant case, however, the alleged acts of discrimination occured at different times and were not so closely related as

was the case in Shuster. Kasper has not alleged that any conciliation efforts by the EEOC on behalf of Calhoun also included him. For the foregoing reasons, this court concludes that Kasper may not rely on Calhoun's filing of a timely charge with the EEOC in order to excuse his non-compliance with that filing requirement.

The 180 day filing requirement, however, is not jurisdictional and is subject to equitable tolling. Coke v. General Adjustment Bureau, Inc., 640 F2d 584 (5th Cir. 1981) (en banc). In his affidavit Kasper states that he was informed by Mr. Al Burfeind, a vice president of the defendant, that he was simply relieved of his duties as regional counsel of the defendant but that he would remain an employee and would simply be unassigned until the defendant could find an appropriate position for him. Kasper also

outlines numerous discussions that he had regarding his continuing on the defendant's payroll and whether he might be assigned another position. The defendant contends that Kasper's "vague request" to Mr. Burfeind and others that they help him secure a transfer or reassignment does not excuse his failure to file a timely charge with the EEOC. However, this court finds that Kasper's affidavit is sufficient to show a genuine issue of material fact as to whether the defendant misled him regarding his employment status with FNMA, thus tolling the filing requirement of the ADEA. For these reasons, the defendant's motion for summary judgment on Kasper's ADEA claim is DENIED.

II. GEORGIA'S AGE DISCRIMINATION STATUTE

By order dated November 22, 1983, this court held that there was no inplied private right of action under O.C.G.A. § 34-1-2, and this court finds no reason to

retreat from that holding. Consequently, the defendant's motion for judgment on the pleadings dismissing Mr. Kasper's cause of action under O.C.G.A. § 34-1-2 is GRANTED.

III. FNMA CHARTER ACT

For his third cause of action Kasper relies upon the language in 12 U.S.C. § 1723a(d)(2), which provides, "Appointments, promotions, and separations so made shall be based on merit and efficiency, and no political test or qualifications shall be permitted or given consideration." The essence of Mr. Kasper's third count is that an employee may enforce the "merit and efficiency" provision by a private action.

Local Division 732, Amalgamated Transit Union v. Metropolital Atlanta Rapid Transit Authority, 667 F2d 1327 (11th Cir. 1982), presents an excellent discussion of the change of attitude by the Supreme Court in implying private rights of action. The

Eleventh Circuit noted that the Supreme Court has drastically modified application of the four-factor test announced in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975), by announcing that the task of a federal court in implied cause of action was solely to determine whether Congress intended to create the private right of action being asserted. TransAmerica Mortgage Advisors, Inc. V. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979); Touche Ross & Co. v. Reddington, 442 U.S. 560, 99 S. Ct. 2479 (1979). After this analysis the Eleventh Circuit stated:

> This court has taken to heart the restricted mandate of the Supreme Court. We have articulated principles of decision for implied right of action cases which appropriately guide our consideration of the jurisdictional question before us. If we are to conclude that Congress meant more than it said when it enacted a statute, we must do so on the basis that Congress actually intended to legislate as we infer. See, e.g., United States v. Capeletti Bros., Inc., 621 F.2d 1309, 1312 (5th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1078 (5th

> Cir. 1980). The issue is not whether, on balance, advocates of judicial remedies have a better case than opponents, but whether we can find a legislative intent to recognize a federal judicial remedy. Noe [v. Metropolitan Atlanta Rapid Transit Authority], 644 F.2d at 439. In order for us to infer a private right of action, or federal jurisdiction, we must have before us clear evidence that Congress intended to provide such a remedy, River v. Rosenthal & Co., 634 F.2d 774. 783 (5th Cir. 1980), and if the legislative history provides no clear indication one way or the other, so that clear evidence of affirmative congressional intent is lacking, we cannot infer that Congress has legislated silently.
>
> 667 F.2d at 1335 (footnotes omitted) (emphasis in original).

This court finds nothing either in the language of the statute in question or in its legislative history which would show that Congress intended there to be a private right of action under the FNMA Charter Act. Since 12 U.S.C. § 23a(d)(2) does not provide a private right of action, Mr. Kasper's third cause of action must be DISMISSED.

IV. THE DEFENDANT'S MOTION FOR SEPARATE TRIALS

The court has carefully considered the defendant's motion for separate trials as to Kasper and Calhoun. This court believes that it and the jury can adequately and properly distinguish between the different claims being asserted and that judicial economy would best be served by allowing the claims to to be tried in one action. Consequently, the defendant's motion for separate trials is DENIED.

V. SUMMARY

The defendant's motion for summary judgment as to the plaintiff's first cause of action (ADEA) is DENIED: the defendant's motion for judgment on the pleadings with respect to the plaintiff's second cause of action (under O.C.G.A. § 34-1-2) and his third cause of action (under 12 U.S.C. § 1723a(d)(2)) is GRANTED. The defendant's

motion for separate trials is DENIED.

SO ORDERED, this 18th day of December, 1984.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALTER W. CALHOUN GEORGE H. KASPER, JR. PLAINTIFF, -VS- FEDERAL NATIONAL MORTGAGE ASSOC. DEFENDANT.	DOCKET NO. C83-1437 ATLANTA, GEORGIA MAY 6, 1986

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ROBERT L. VINING, JR.,

UNITED STATES DISTRICT JUDGE.

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF: H. A. STEPHENS, JR.

FOR THE DEFENDANT: JEFFERSON D. KIRBY,III

KIMBERLY C. BRAMLETT
OFFICIAL COURT REPORTER
ROOM 2167, 75 SPRING STREET, S.W.
ATLANTA, GEORGIA 30303

(OMMITTING ARGEMENT OF COUNSEL AND BEGINNING ON PAGE 11)

THE COURT: WELL, I HELD IN THE PRIOR ORDER THAT THE CAUSE OF ACTION ACCRUED ON JULY 22, 1982, THEREBY MEANING THAT THE 180-DAY FILING REQUIREMENT TIME BEGAN THAT DAY. AND I CERTAINLY AM NOT OF A MIND TO CHANGE THAT ORDER. THAT BEING TRUE, THE CAUSE OF ACTION HAVING ACCRUED ON THAT DAY, THE FIRST QUESTION THAT HAS TO BE CONSIDERED IS WHETHER OR NOT THERE IS A TOLLING OF THE TIME PERIOD. THIS OPERATIVE STATUTE 29 UNITED STATES CODE, SECTION 626 SETS OUT THE ADMINISTRATIVE TIME TABLE FOR ADEA CLAIMS.

THE FACT THERE MAY HAVE BEEN CONVERSATION DOES NOT MEAN THAT THE 180-DAY FILING REQUIREMENT DOES NOT BEGIN TO RUN. IT BEGINS TO RUN BUT THEN THE QUESTION BECOMES IS IT SUBJECT TO TOLLING. AND THEN, OF COURSE, THERE HAS TO BE A PERIOD OF TIME WHEN THE 180 DAYS STARTS TO RUN AGAIN

WHEN THE QUESTION OF TOLLING IS NOT INVOLVED.

UNDER THE FACTS THAT HAVE BEEN PRESENTED IN THIS MOTION, AND TAKING INTO ACCOUNT MR. KASPER'S LATEST DEPOSITION, I AM GOING TO FIND HE IS TIME BARRED FROM PURSUING A CLAIM INVOLVING HIS REMOVAL AS REGIONAL COUNSEL OF THE FNMA, FANNIE MAE, ON THIS BASIS HE WAS NOTIFIED ON JULY 22, 1982 THAT HIS SERVICES WERE NO LONGER REQUIRED AND HE WAS BEING REMOVED AS REGIONAL COUNSEL. FURTHER, THAT THIS WAS THE LAST DAY ON WHICH HE PERFORMED ANY DUTIES FOR THE FEDERAL NATIONAL MORTGAGE ASSOCIATION OR ADMINISTRATION. THAT THE QUESTION OF TOLLING DOES NOT APPLY TO THE REMOVAL AS REGIONAL COUNSEL BECAUSE THERE IS NO EVIDENCE AT ALL OF ANY CONVERSATION ABOUT RETURNING TO A POSITION OF REGIONAL COUNSEL. THEREFORE HIS CLAIM WAS NOT FILED WITHIN 180 DAYS AFTER HE BECAME AWARE OR AFTER THE ACT WHICH IS ALLEGED TO

HAVE BEEN AN UNLAWFUL EMPLOYMENT PRECTICE OCCURRED.

AS TO THE CAUSE OF ACTION FOR INVOLUNTARY TERMINATION OR RETIREMENT, PRESENTS A LITTLE DIFFERENT PROBLEM. HOWEVER, THE OPERATIVE DATE THERE AGAIN IS JULY 22, 1982. THAT IS WHEN HE WAS TOLD HIS SERVICES WERE NO LONGER REQUIRED OR EVEN GIVING HIM THE BENEFIT OF THE DOUBT, THE LATEST OPERATIVE DAY WOULD BE AUGUST 4, 1982 WHEN HE RECEIVED A LETTER WHICH SAID HE WOULD BE RETIRED AUGUST 5, 1983 AND I THINK IT IS SIGNIFICANT DURING THE YEAR FROM AUGUST TO AUGUST, AUGUST OF '82 TO AUGUST OF 1983, THAT POSITION NEVER CHANGED AND THAT DATE NEVER CHANGED. IT WAS HIS RETIREMENT DATE.

NOW, THE FACT THAT HE MAY HAVE CONTINUED TO WORK OR BE ON THE PAYROLL DURING THIS PERIOD OF TIME DOES NOT ALTER THE FACT THAT HE WAS TO BE RETIRED, AND THAT WAS ONE OF THE POINTS IN THE DELAWARE STATE

COLLEGE VS. RICKS AND THAT IS MERE CONTINUITY OF EMPLOYMENT, WITHOUT MORE, IS INSUFFICIENT TO PROLONG THE LIFE OF A CAUSE OF ACTION FOR EMPLOYMENT DISCRIMINATION. THERE, OF COURSE, RICKS, WORKED FOR A YEAR, IF I RECALL THE FACTS OF THE DELAWARE STATE COLLEGE CASE. RICKS WAS NOTIFIED HE WOULD NOT BE GRANTED TENURE AND HE WOULD HAVE TO LEAVE THE EMPLOYMENT OF THE UNIVERSITY, BUT THE UNIVERSITY HAD A POLICY OF ALLOWING THE TEACHERS WHO WERE NOT TENURED TO CONTINUE FOR ONE YEAR AFTER NOTICE THAT THEY WOULD NOT RECEIVE TENURE. AND ALSO DURING THAT PERIOD OF TIME WHICH EVEN MAKE RICKS A STRONGER CASE FOR TOLLING THAN THIS ONE, HE HAD GRIEVANCES PENDING BEFORE VARIOUS COMMITTEES OF THE UNIVERSITY THAT WERE DISPOSED OF DURING THAT YEAR.

HERE THERE ARE TWO IMPORTANT FACTORS WHICH LEAD ME TO BELIEVE THAT MR. KASPER IS TIME BARRED ON HIS INVOLUNTARY

RETIREMENT CLAIM. ONE IS, HE ATTENDED THIS CONFERENCE ON AGE DISCRIMINATION IN MARCH OF 1983 THEREBY KNOWING THAT HE WOULD HAVE A RIGHT.

SECONDLY AND MORE IMPORTANT MR. KASPER IS AN ATTORNEY AND I THINK IS PRESUMED TO KNOW THE LAW, BEING A PRACTICING ATTORNEY, AND I DO NOT RECALL THE CASE BUT SEEMS LIKE THE FIFTH CIRCUIT CASE HELD EVEN A LAY PERSON THERE WAS PRESUMED TO KNOW THE LAW ABOUT FILING AND SO FORTH.

AND EVEN THOUGH THE RIGHT BECAME APPARENT IN MARCH OF 1983, NOTHING WAS DONE UNTIL AUGUST 24, 1983 WHEN THE E.E.O.C. CLAIM WAS FILED BY MR. KASPER. THE CLAIM WITH E.E.O.C. THEREFORE WAS FILED SOME THIRTEEN MONTHS AFTER THE ACT WHICH IS ALLEGED TO HAVE BEEN AN LAWFUL EMPLOYMENT PRACTICE; THAT IS, INVOLUNTARY RETIREMENT AND REMOVAL AS REGIONAL DIRECTOR OF FNMA AND WAS FILED SOME SIX MONTHS AFTER MR. KASPER SAID HE ATTENDED A CONFERENCE ON AGE

DISCRIMINATION WHERE HE BECAME HE SAYS AWARE OF HIS RIGHT TO PURSUE THIS MATTER.

SO EVEN TAKING IN ACCOUNT A QUESTION OF EQUITABLE TOLLING, I AM GOING TO FIND MR. KASPER'S CAUSE FOR INVOLUNTARY RETIREMENT IS ALSO TIME BARRED AND HE DID NOT DILIGENTLY PURSUE THIS MATTER BY FILING A CLAIM WITH THE E.E.O.C. WITHIN THE TIME FRAME SET OUT IN 29 U.S.C. 626.

THERE IS ANOTHER CASE -- I ASSUME DEFENDANT CITED, WHICH IS FAIRLY ON POINT. BALDWIN COUNTY WELCOME CENTER VS. BROWN, 104 SUPREME COURT REPORTER 1723 AND I THINK IT PRETTY WELL CHANGES TWO PRIOR ELEVENTH CIRCUIT CASES WHICH HELD 180-DAY PERIOD ONLY BEGINS TO RUN FROM THE TIME THE CONPLAINTANT KNOWS OR REASONABLY SHOULD HAVE KNOWN THAT THE CHALLENGED ACT HAS OCCURED. BALDWIN COUNTY WELCOME CENTER CASE SIMPLY SETS OUT THE CHARGE SHALL BE FILED WITHIN 180 DAYS AFTER THE ALLEGED UNLAWFUL PRACTICE OCCURS.

THEN AN OLDER FIFTH CIRCUIT CASE, PAYNE VS. CRANE COMPANY 560 F.2d 198, 1977 CASE, WHICH SAID ESSENTIALLY WHEN THE EMPLOYER DOES ANYTHING BY WAY OF WORDS OR ACTS WHICH WOULD SHOW AN INTENT ON THE EMPLOYER'S PART TO DISPENSE WITH THE SERVICES OF THE EMPLOYEE, THAT WOULD BE THE DATE FROM WHICH THE 180-DAY FILING PERIOD WOULD BEGIN TO RUN BECAUSE THAT WOULD BE THE LAST DAY ON WHICH ANY SERVICES WERE REQUIRED OF THE EMPLOYEE; AND IN THIS CASE, THE LAST DAY ON WHICH THE SERVICES WERE REQUIRED WAS JULY 22, 1982.

THEREFORE, I WILL GRANT THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS OF MR. KASPER FOR REMOVAL AS REGIONAL COUNSEL OF FNMA AND FOR INVOLUNTARY RETIREMENT, SUCH CLAIMS BEING TIME BARRED.

THE ORDER OF THE COURT WILL BE AS STATED HERE ON THE RECORD AND I WILL SIMPLY ENTER A SHORT ORDER SUSTAINING THE MOTION FOR SUMMARY JUDGMENT AND ENTERING UP THE DISMISSAL. PS25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALTER W. CALHOUN,

Plaintiff,

and

GEORGE H. KASPER, CIVIL ACTION

Intervenor, No. C 83-1437 A

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant.

O R D E R

For the reasons stated on the record in open court on May 6, 1986, the defendant's motion for summary judgment is GRANTED, and the clerk will enter judgment dismissing the intervenor's claims with prejudice.

SO ORDERED, this 6th day of May, 1986.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Walter W. CALHOUN, Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant-Appellee,

George H. Kasper, Jr., Intervenor-Appellant.

No. 86–8438.

United States Court of Appeals, Eleventh Circuit.

Aug. 3, 1987.

Former employee of Federal National Mortgage Association brought an action against FNMA challenging his termination. The United States District Court for the Northern District of Georgia, No. C83–1437A, Robert L. Vining, Jr., J., entered judgment in favor of FNMA, and former employee appealed. The Court of Appeals, Roney, Chief Judge, held that: (1) Federal National Mortgage Association Charter Act did not give former employee private right of action; (2) Georgia penal statute prohib-

iting age discrimination in employment did not give rise to private cause of action; and (3) one hundred and eighty-day period in which to file claim with Equal Employment Opportunity Commission applicable to employee's unlawful termination claim commenced to run when employee received unequivocal notice that FNMA intention to remove him and terminate his employment.

Affirmed.

1. Officers and Public Employees ⇐69.4

Federal National Mortgage Association Charter Act did not give former FNMA employee private right of action; employee alleged that he was hired prior to 1968 by predecessor corporation and was not terminated under civil service retirement laws. National Housing Act, §§ 302(a)(2)(A, B), 309(d)(1, 2), as amended, 12 U.S.C.A. §§ 1717(a)(2)(A, B), 1723a(d)(1, 2).

2. Civil Rights ⇐68

Georgia penal statute prohibiting age discrimination in employment did not give rise to private cause of action. O.C.G.A. § 34–1–2.

3. Civil Rights ⇐33

One hundred and eighty-day period in which to file claim with Equal Employment Opportunity Commission, applicable to Federal National Mortgage Association employee's unlawful termination claim, commenced to run when employee received unequivocal notice that FNMA intention to remove him and terminate his employment, rather than when he was actually terminated. Age Discrimination in Employment Act of 1967, § 7(d)(1), as amended, 29 U.S. C.A. § 626(d)(1).

4. Civil Rights ⇐33

Federal National Mortgage Association's failure to provide employee with a hearing on his discharge was not a continuing discriminatory act sufficient to toll 180–day period applicable to his unlawful dis-

charge claim under Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, § 7(d)(1), as amended, 29 U.S.C.A. § 626(d)(1); 42 U.S. C.A. § 1983.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, Chief Judge, KRAVITCH and EDMONDSON, Circuit Judges.

RONEY, Chief Judge:

George H. Kasper, Jr., an intervenor party-plaintiff in the district court, claimed that his removal as Regional Counsel and subsequent involuntary retirement by the Federal National Mortgage Association (FNMA) violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621–634, the Federal National Mortgage Association Charter Act (Charter Act), 12 U.S.C.A. §§ 1716–1723h, and Georgia's Prohibition of Age Discrimination in Employment statute, O.C.G.A. § 34–1–2. The

district court held that neither the Charter Act nor the Georgia Act provided a private right of action, and dismissed those claims. It granted summary judgment on the ADEA claim because Kasper had not timely filed a charge with the Equal Employment Opportunity Commission (EEOC) as required by 29 U.S.C.A. § 626(d)(1), and no factors had been shown to warrant equitable tolling of the limitations period. We affirm.

Kasper accepted an appointment with the FNMA's predecessor in December, 1965, after sixteen years experience in private law practice, as a career attorney and was promoted to Assistant Agency Counsel in 1967. FNMA was reorganized in 1968 to create two separate corporations. 12 U.S.C.A. § 1717(a)(2). One corporation, Government National Mortgage Association (GNMA), remained a governmental agency, while the other corporation, a new FNMA, was created as a private corporation. Upon reorganization, Kasper became an employee of GNMA and, on November 30, 1968, resigned his position with GNMA to accept an identical position with the new-

ly created FNMA. He was promoted to the position of Southeastern Regional Counsel in 1977 and held that position until July 1982.

On July 22, 1982, FNMA's Southeastern Regional Vice-President, Glenn T. Austin, Jr., informed Kasper that his services were no longer required, and instructed him to contact Al Burfiend, FNMA's Vice-President for Personnel and Administration in FNMA's Washington, D.C. office, to discuss severance terms. Kasper informed his staff of his departure on that afternoon and had cleaned out his office by noon of the next day.

Discussions with Burfiend established that Kasper would receive credit for 19 years of service and 6 months severance pay. An agreement was reached to allow Kasper to remain on the payroll for one year, by extending his severance pay over that period, providing him with 20 years service for retirement purposes. Kasper alleges that during their discussions he asked Burfiend to look into a transfer or

reassignment. At no time after July 23, 1982 did Kasper return to the office to work or receive assignments from FNMA. FNMA advertised the availability of Kasper's former position on July 28, 1982. In August, 1982, Kasper received a memorandum from Burfiend specifying that Kasper would "be continued in FNMA employment from August 8, 1982 through August 5, 1983, at which time he [would] retire under the discontinued service provisions of the Civil Service Retirement System (immediate entitlement)." Kasper was to receive his full salary until August 7, 1982, when his income would begin to be reduced on a quarterly basis until his retirement on August 5, 1983. He was to continue receiving fringe benefits except for leave based on full salary rate, and he was to receive accrued vacation pay with his final salary check upon his retirement in 1983. Except for minor adjustments requested by Kasper, he was paid in accordance with the terms of the memorandum.

In late 1982, Kasper met his replacement, Judy Dedmon, who was 31 years old

at the time. As a result of attending an American Bar Association seminar concerning age discrimination on March 11, 1983, Kasper decided that he had been dismissed because of his age. Kasper wrote Oakley Hunter, a former president of FNMA and a member of the FNMA Board of Directors, and asked if Hunter could look into his situation. The gist of the letter appeared to focus on whether a better severance package could be arranged. In Kasper's letter to Hunter, he charged that he had never been given an explanation for his involuntary discharge and questioned its cause and justification. In a June 1983 letter to David Maxwell, chairman of the Board of Directors of FNMA, Kasper accused FNMA of corporate wrongdoing and claimed to have statistical evidence of discrimination. Kasper was contacted by Caryl Berstein, FNMA's Executive Vice-President, General Counsel, and Secretary. Kasper's request from Bernstein was a more favorable severance agreement. By letter dated August 5, 1983, Bernstein declined to agree to different severance terms and reaffirmed FNMA's intention to

adhere to the August 1982 proposal. Kasper received a subsequent notice of his termination under "discontinued service retirement" effective August 5, 1983, and has received retirement benefits from that date. Kasper filed charges with the EEOC on August 24, 1983, and filed a motion to intervene in this proceeding on November 15, 1983.

I. No Private Right of Action under the Charter Act

[1] Kasper contends that under the Federal National Mortgage Association Charter Act, those individuals hired prior to 1968 and who were employees of the predecessor corporation Government National Mortgage Corporation were "government employees" and retained such status. As a Government employee, he had a "legitimate claim of entitlement to continued employment" until removed in accordance with established procedure. FNMA failed to adhere to the regulations and a right of action therefore is implied under the FNMA Charter Act in Kasper's favor.

Kasper's assertion that he is a Government employee for the purposes of this action is erroneous. To support his status as a Government employee, Kasper relies on *Northrip v. Federal National Mortgage Association*, 527 F.2d 23 (6th Cir. 1974).

In *Northrip*, the Sixth Circuit stated:

> Before the reorganization of FNMA, its employees were government personnel with the Department of Housing and Urban Development, and therefore were covered by civil service requirements and retirement laws. To protect employee benefits that had accumulated, the statute provided for continuation of their participation in the system as long as they remained employees of FNMA. However, all employees hired after 1968 became employees of the corporation and are not subject to the civil service laws. 12 U.S.C. § 1723a(d)(1).

527 F.2d at 31. In dicta, the *Northrip* court stated that some FNMA employees

had some sort of government status. *Id.* at 32.

The Sixth Circuit mistakenly referred to 12 U.S.C.A. § 1723a(d)(1) as applying to FNMA, rather than GNMA; therefore, *Northrip* is not controlling in this case. The extension of the protections of civil service and classification laws found in 12 U.S.C.A. § 1723a(d)(1) relate to employees of the "Association," defined in 12 U.S.C.A. § 1717(a)(2)(A) as GNMA.

Kasper also points to two memoranda addressed to all employees of GNMA inviting and encouraging them to join the newly created FNMA in 1968 to support his Government employee status. A review of the memoranda reveals clear language that FNMA is a private corporation and that new personnel policies and benefits would be established by the corporation, which were separate and distinct from the federal civil service laws. It is also evident from the language of 12 U.S.C.A. § 1723a(d)(2), the subsection addressing appointment and compensation of personnel of the "Corporation," defined in section 1717(a)(2)(B) as FNMA, that Congress intended the status

of Government employee to extend to civil service retirement laws only.

(2) The board of directors of the corporation shall have the power to select and appoint or employ such officers, attorneys, employees, and agents, to vest them with such powers and duties, and to fix and to cause the corporation to pay such compensation to them for their services, as it may determine; *and any such action shall be without regard to the Federal civil service and classification laws....* Each officer and employee of the corporation who is employed by the corporation prior to January 31, 1972, and *who on the day previous to the beginning of such employment will have been subject to the civil service retirement law* (subch. III of ch. 83 of Title 5) *shall*, so long as his employment by the corporation continues without a break in continuity of service, continue to be subject to *such* law; and for the purpose of *such* law his employment by the corporation without a break in continuity of service shall be deemed to be employment by the Government of the United

States.

12 U.S.C.A. § 1723a(d)(2) (emphasis added).

Kasper further asserts that the statutory language provides an implied right of action. In essence, Kasper relies upon the language in 12 U.S.C. § 1723a(d)(2), which states, "Appointments, promotions, and separations so made shall be based on merit and efficiency, and no political tests or qualifications shall be permitted or given consideration."

The standard for determining whether a private right of action is implied in a federal statute was set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975), where the Court stated that the following factors were relevant:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted.' ...—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?.... Third, is it consistent with the

> underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?.... And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (emphasis in original)

In *Local Division 732 Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 667 F.2d 1327 (11th Cir.1982), cited in the district court opinion, this Court noted that the Supreme Court has drastically modified application of the four-factor test announced in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), by announcing that the task of a federal court in implied cause of action cases is to determine whether Congress intended to create the private right of action being asserted. *TransAmerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82

(1979).

Since a review of the Charter Act and its legislative history reveals nothing to show Congress intended a private right of action under this section, the conclusion must be that Congress did not intend to create the cause of action asserted here.

II. No Private Right of Action under O.C.G.A. § 34-1-2.

[2] The district court held that no private right of action arose under O.C.G.A. § 34-1-2, a penal statute prohibiting age discrimination in employment. Penal statutes in Georgia do not give rise to a private cause of action for the conduct proscribed. The court properly relied upon *Webster v. Singer Sewing Machines Company*, N.B-76966 (Fulton Sup.Ct. May 15, 1973) (Georgia state trial court holding that no cause of action accrued under Ga.Code Ann. § 54-1102, the predecessor to O.C.G.A. § 34-1-2), and two Georgia appellate court decisions finding no cause of action under similar Georgia penal statutes, *Cox Broad-*

casting Corp. v. Cohn, 231 Ga. 60, 200 S.E.2d 127 (1973), *rev'd on other grounds*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 *judgment conformed*, 234 Ga. 67, 214 S.E.2d 530 (1975), and *Mitchell v. Southern Dairies, Inc.*, 77 Ga.App. 771, 49 S.E.2d 912 (1948).

Kasper argues that the district court incorrectly interpreted Georgia precedent, relying upon *LaBarre v. Payne*, 174 Ga.App. 32, 329 S.E.2d 533 (1985), a case in which a Georgia appellate court recognized a private cause of action for embracery, conduct for which Georgia law imposes criminal sanctions. *See* O.C.G.A. § 16–10–91. Kasper's reliance on *LaBarre* is misplaced. The Georgia Court of Appeals supported its *LaBarre* holding by citing to the common law tort of embracery in other jurisdictions and *Corpus Juris Secundum*. It is evident from these references that the court relied upon a common law tort of embracery to sustain the action and simply use the Georgia penal statute to define the elements of the tort.

III. ADEA Claim.

[3] Kasper asserted two claims of discrimination: (1) termination as Regional Counsel, and (2) "involuntary retirement discontinued service." The district court held that Kasper had not filed charges with the EEOC within the 180 days required by law. The issue of timeliness turns on when the period for filing began.

Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), a case involving a college professor denied tenure, held the limitations period commenced no later than when the college announced its official position on tenure, not when the professor's terminal contract expired. Under this authority, the district court determined that for purposes of applying the limitations period of 29 U.S.C.A. § 626(d)(1), July 22, 1982 was the date on which Kasper's cause of action for his removal as Regional Counsel accrued. On his involuntary retirement claim, the district court found that, giving plaintiff the

benefit of the doubt, the latest operative date would be August 4, 1982, the date when Kasper received a letter stating that he would be retired on August 5, 1983.

Kasper argues that the operative date, at least for the unlawful termination, is August 5, 1983, the date of actual termination. He seeks to distinguish *Ricks* on the basis that his complaint alleges a continuation of discriminatory acts up until his actual termination. Kasper's complaint reveals no allegations of continuing acts of discrimination. In fact, all the acts complained of occurred in 1982. From August 1982 forward, FNMA did not deviate from its expressed intention to terminate Kasper as of August 5, 1983.

The proper focus for purposes of establishing the time at which the limitations period begins to run "is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S.Ct. 28, 29, 70 L.Ed.2d 6 (1981) (emphasis in original) (citing *Ricks*, 449

U.S. at 258, 101 S.Ct. at 504). "The fact of termination is not itself an illegal act." *Id.* The alleged illegal acts here were the decision to terminate and the notice of that decision to Kasper. It is clear from the record that Kasper received unequivocal notice on July 22 and August 4, 1982 of FNMA's intention to remove him as Regional Counsel and to terminate his employment on August 5, 1983. FNMA never waivered from this position.

Kasper alleges that the authority to terminate his employment was vested in the FNMA Board of Directors (Board) and that neither Austin nor Burfiend possessed that authority. Unlike the plaintiff in *Ricks*, Kasper claims, he was never notified of any action of the Board. Austin had the authority to terminate Kasper, however, if his conduct was deleterious to the continued functioning of the unit. It is clear that Kasper considered the notice authoritative because he cleaned out his office on July 22 and 23 and never received any further work assignments from FNMA. Kasper

sought letters of recommendation from FNMA officials and met his 31-year-old replacement in the fall of 1982, and accepted other employment in May 1983 even though he was still on the FNMA payroll. At no time before his actual termination in 1983 did Kasper evidence a doubt of Austin's authority or of FNMA's intentions. Kasper's correspondence with FNMA officials focused on his obtaining severance terms more favorable than those noticed in the August 4, 1982 memorandum. At no time did Kasper formally request a transfer or reassignment. The latest possible operative date for limitations purposes would have been the point when Kasper met his replacement.

The district court found no factors present sufficient to equitably toll the limitation period, but found two factors support the decision that Kasper's involuntary retirement claim should be time barred. First, Kasper acknowledges recognition of his right after attending a conference on

age discrimination in March 1983, but did not file his charge with EEOC until almost six months later. Second, the court found that the fact that Kasper was an attorney weighed against equitable tolling.

[4] Kasper's final argument is that the limitations period did not begin to run because he has never been provided a hearing on his discharge by FNMA and this constitutes a continuing violation under *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. Unit B 1981). Reliance on *Rubin* is inapposite because that case addresses a claim under 42 U.S.C.A. § 1983 for a due process violation. Kasper's claim arises under the ADEA and failure to provide a hearing does not constitute a continuing discriminatory act on these facts.

For the foregoing reasons, the district court is due to be

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-8438

WALTER W. CALHOUN,

Plaintiff,

versus

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant-Appellee,

GEORGE H. KASPER, JR.,

Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING
(October 26, 1987)

BEFORE: RONEY, Chief Judge, KRAVITCH and EDMONDSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by George H. Kasper., Appellant, is denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
CHIEF JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for Certiorari upon

Mr. Jefferson D. Kirby, III
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Attorneys for Respondent, Federal National Mortgage Association, by certified mail, return receipt requested, duly addressed and postage prepaid.

This 16TH day of December, 1987.

George H. Kasper, Jr.
Attorney for Petitioner
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Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE H. KASPER, JR.,

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BEST AVA

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether claims never raised by the Petitioner in the Courts below, such as those relating to an alleged breach of contract, a supposed violation of due process, and related matters, can properly be included in a petition for a writ of certiorari.

2. Whether the Federal National Mortgage Association Charter Act provides a private cause of action by an employee claiming to have been wrongfully discharged from his employment.

3. Whether the 180-day period within which a charge of discrimination is to be filed with the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act, 29 U.S.C. Section 626(d)(1), begins to run at the time that an employee is notified of his termination.

4. Whether requests initiated by an employee to be transferred or reassigned to another position after that employee has been notified of his termination toll the 180-day period for filing a charge of employment discrimination with the Equal Employment Opportunity Commission.

ILABLE COPY

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.[1]

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[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Federal National Mortgage Association: None.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
I. The Relevant Facts	4
II. The Proceedings Below	8
REASONS FOR DENYING THE WRIT	9
I. No Private Right Of Action Can Be Implied Under The FNMA Charter Act	10
II. Kasper's EEOC Charge Was Untimely Filed	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984)	14
Brandon v. Holt, 469 U.S. 464 (1985)	9
Canfield v. Sullivan, 774 F.2d 1466 (9th Cir. 1985)	13
Chardon v. Fernandez, 454 U.S. 6 (1981)	10,14
Cort v. Ash, 422 U.S. 66 (1975)	10-11
Delaware State College v. Ricks, 449 U.S. 250 (1980)	10,13
Duignan v. United States, 274 U.S. 195 (1927)	9
Howkins v. Caldwell, 587 F. Supp. 98 (N.D. Ga. 1983), *aff'd without opinion*, 749 F.2d 731 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985)	13
Middlesex County Sewerage Authority v. National Sea Clammers Assn, 453 U.S. 1 (1981)	11
Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986)	14
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)	11
FEDERAL STATUTES	
Age Discrimination in Employment Act	
29 U.S.C. §§ 621-634	2,8
29 U.S.C. § 626(d)(1)	4,8
Civil Service Retirement Act	
5 U.S.C. §§ 8331-8348	12
Federal National Mortgage Association Charter Act	
Pub. L. No. 90-448, § 810(d), 82 Stat. 476 (1982)	12
Pub. L. No. 93-383, § 806(l), 88 Stat. 728 (1974)	12
12 U.S.C. § 1716	11,12

Table of Authorities Continued

	Page
12 U.S.C. § 1717(a)	5
12 U.S.C. § 1718(a)	5
12 U.S.C. § 1723a(d)	2-4,13
Intergovernmental Personnel Act 42 U.S.C. §§ 4701-4772	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-988

GEORGE H. KASPER, JR.,

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Federal National Mortgage Association ("FNMA"), respectfully urges denial of the petition for a writ of certiorari to review the judgment and order entered by the United States Court of Appeals for the Eleventh Circuit on August 3, 1987.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Certain provisions of the Federal National Mortgage Association Charter Act ("FNMA Charter Act"), 12 U.S.C. §§ 1716-1723h, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, are involved in this case. In particular, 12 U.S.C. § 1723a(d)(2) provides that:

> The board of directors of the corporation shall have the power to select and appoint or employ such officers, attorneys, employees, and agents, to vest them with such powers and duties, and to fix and to cause the corporation to pay such compensation to them for their services, as it may determine; and any such action shall be without regard to the Federal civil service and classification laws. Appointments, promotions, and separations so made shall be based on merit and efficiency, and no political tests or qualifications shall be permitted or given consideration. Each officer and employee of the corporation who is employed by the corporation prior to January 31, 1972, and who on the day previous to the beginning of such employment will have been subject to the civil service retirement law (subch. III of ch. 83 of Title 5) shall, so long as his employment by the corporation continues without a break in continuity of service, continue to be subject to such law; and for the purpose of such law his employment by the corporation without a break in continuity of service shall be deemed to be employment by the Government of the United States. The corporation

shall contribute to the Civil Service Retirement and Disability Fund a sum as provided by section 8334(a) of Title 5, except that such sum shall be determined by applying to the total basic pay (as defined in section 8331(3) of Title 5 and except as hereinafter provided) paid to the employees of the corporation who are covered by the civil service retirement law, the per centum rate determined annually by the Director of the Office of Personnel Management to be the excess of the total normal cost per centum rate of the civil service retirement system over the employee deduction rate specified in section 8834(a) of Title 5. The corporation shall also pay into the Civil Service Retirement and Disability Fund such portion of the cost of administration of the fund as is determined by the Director of the Office of Personnel Management to be attributable to its employees. Notwithstanding the foregoing provisions, there shall not be considered for the purposes of the civil service retirement law that portion of the basic pay in any one year of any officer or employee of the corporation which exceeds the basic pay provided for positions listed in section 5312 of Title 5 on the last day of such year: *Provided,* That with respect to any person whose employment is made subject to the civil service retirement law by section 806 of the Housing and Community Development Act of 1974, there shall not be considered for the purposes of such law that portion of his basic pay in any one year which exceeds the basic pay provided for positions

> listed in section 5316 of such Title 5 on the last day of such year. Except as provided in this subsection, the corporation shall not be subject to the provisions of Title 5.

29 U.S.C. §626(d) specifies that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

I. The Relevant Facts

George H. Kasper, Jr. began working for FNMA's predecessor, an agency of the United States Govern-

ment also known as the Federal National Mortgage Association, in December, 1965. The name of that agency was changed to the Government National Mortgage Association ("GNMA") during a reorganization in which the private entity, FNMA, was created on September 1, 1968. 12 U.S.C. §§ 1717(a), 1718(a). Kasper resigned from GNMA effective November 30, 1968, to join FNMA.

Kasper, who had been practicing law since 1949, was initially employed by FNMA as Assistant Regional Counsel. In May, 1977, he was appointed Regional Counsel for FNMA's Southeastern Region, the position that he held until the time of his termination. At the time that his employment with FNMA was terminated, Kasper was almost 57 years old.

On July 22, 1982, Glenn T. Austin, Jr., the Regional Vice-President for FNMA's Southeastern Region, asked Kasper to come to his office and, after closing the door, told him, "Mr. Kasper, your services are no longer required." Austin was "as gentlemanly as he possibly could be under the circumstances," and he asked Kasper to contact Al Burfeind, FNMA's Vice-President for Personnel and Administration, in Washington, D.C. Kasper informed his staff that afternoon of his departure, and he cleaned out his office by noon of the next day. At no time thereafter did Kasper perform any services for FNMA.

As a result of his conversations with Burfeind, Kasper was credited with 19 years of service and 6 months of severance pay. Instead of paying the severance benefits in a lump-sum, Burfeind offered to extend the payments for an entire year so that Kasper would be considered to have 20 years of service for retirement purposes. Burfeind prepared and sent

Kasper an August 4, 1982 memorandum, stating that Kasper would "be continued in FNMA employment from August 8, 1982 through August 5, 1983, at which time he will retire under the discontinued service provisions of the Civil Service Retirement System (immediate entitlement)." The August 4, 1982 memorandum further detailed that Kasper was to receive his full salary until August 7, 1982, when his income would be reduced on a quarterly basis until his retirement on August 5, 1983. He was to continue receiving fringe benefits except for leave based on his full salary rate, and he was to receive accrued vacation pay with his final salary check upon his retirement in 1983. Except for minor adjustments requested by Kasper, he was paid in accordance with the terms of the August 4, 1982 memorandum.

Kasper claims to have asked Burfeind to look into the possibility of a transfer or a reassignment to another position within FNMA. At no time during any of their conversations did Burfeind initiate any discussion concerning the possibility of a transfer, nor did he ever indicate that such a position might be available. Rather, in response to Kasper's requests to be considered for another job in the organization, Burfeind supposedly said he would check into it. Kasper never sent a formal request for a transfer to anyone with FNMA, nor did anyone at FNMA instruct him not to seek other employment.

On the contrary, during the summer of 1982, Kasper contacted Howard S. Carnes, the former Regional Vice-President for FNMA's Southeastern Region, and James Murray, the President of FNMA, and requested that they prepare letters of recommendation

for him to use with other prospective employers. Both of them prepared and sent appropriate letters to him.

In late 1982, sometime between October and December, Kasper was introduced to his replacement, Judy Dedmon, the new Regional Counsel for FNMA's Southeastern Region. At that time, Dedmon was 31 years old.

On March 11, 1983, as a result of attending a seminar on employment discrimination conducted by the American Bar Association, Kasper decided that his age was the reason that FNMA had dismissed him. He wrote to Oakley Hunter, the former President of FNMA and a member of FNMA's Board of Directors, on March 26, 1983, claiming that his discharge was unwarranted and requesting additional separation benefits.

Shortly thereafter, in mid-April, 1983, Kasper began working as an hourly-paid consultant for Federated Financial Corporation. On May 1, 1983, he became a full-time employee of Federated Financial.

In the meantime, however, Kasper continued to seek additional severance benefits from FNMA. In June, 1983, he wrote to David Maxwell, Chairman of the FNMA Board of Directors, claiming to have statistical evidence of discrimination and accusing FNMA of corporate wrongdoing. Caryl Bernstein, FNMA's Executive Vice-President, General Counsel and Secretary, contacted Kasper in response to that letter in July, 1983, and Kasper advised her that he wanted a full year's severance pay as well as additional benefits.

By letter dated August 5, 1983, FNMA rejected Kasper's demands and reconfirmed its intention to

adhere to the arrangements set forth in the August 4, 1982 memorandum. Kasper's "discontinued service retirement" was effective August 5, 1983, and he has been receiving retirement payments since that time in accordance with the terms of the memorandum.

On August 24, 1983, 398 days after he was informed of his termination, Kasper filed a charge of age discrimination with the Equal Employment Opportunity Commission. In that charge, Kasper alleged that he had been involuntarily retired from his Regional Counsel position on August 12, 1983.

I. The Proceedings Below

On November 15, 1983, Kasper sought leave to intervene in an action filed by another former employee, Walter Calhoun, against FNMA under the ADEA and related statutes then pending in the United States District Court for the Northern District of Georgia. Leave to intervene was granted on February 16, 1984, and Kasper filed a complaint, claiming that he had been terminated on account of his age in violation of the ADEA, the FNMA Charter Act and Georgia law.

In an order dated December 18, 1984, the District Court dismissed the claims under Georgia law and those under the FNMA Charter Act, finding that no private right of action to remedy allegedly wrongful terminations could be implied under either statute. On May 6, 1986, Kasper's ADEA claim was dismissed. The Court found that the charge of discrimination filed with the EEOC had not been filed within 180 days of the date on which Kasper had been notified of his involuntary retirement as required by 29 U.S.C. Section 626(d)(1). That limitations period was not tolled until the charge was finally filed since

Kasper himself conceded that he had met his 31-year old replacement in the fall of 1982 and he had decided that age was a factor in his discharge in March 1983. As a practicing attorney knowledgeable in discrimination law, Kasper was presumed to be aware of the requirements for compliance with the ADEA, and, as he had not diligently pursued this action after discovering his claims, his EEOC charge was untimely.

On August 3, 1987, in a decision reported at 823 F.2d 451, the Court of Appeals for the Eleventh Circuit affirmed these rulings. A petition for rehearing was denied on October 26, 1987.

REASONS FOR DENYING THE WRIT

At no time in the Courts below did Kasper present the due process, breach of contract and related issues he seeks to raise here, and, for that reason alone, the petition should be denied with respect to those matters. *Brandon v. Holt,* 469 U.S. 464, 473 n.25 (1985); *Duignan v. United States,* 274 U.S. 195, 200 (1927). No exceptional circumstances justify consideration of issues not addressed below, and Kasper cannot be permitted to introduce entirely new, albeit meritless, claims into this action at this stage of the proceeding.

With respect to those questions that may properly be included in the petition, the FNMA Charter Act and ADEA claims, no basis for review on certiorari can be shown. No conflict exists among the courts as to any of the issues raised, and no important questions of law are involved in Kasper's claims. Consideration of implied rights of action in favor of those employed by the government at the time the FNMA Charter Act was enacted would affect virtually no one other than the litigants in this action, and, in

any event, the Courts below properly applied the standards developed by this Court for determining whether a federal statute creates an implicit remedy.

Nor is yet another review by this Court of the commencement of the 180-day period within which a charge of discrimination must be filed with the Equal Employment Opportunity Commission warranted. In both *Delaware State College v. Ricks,* 449 U.S. 250 (1980), and *Chardon v. Fernandez,* 454 U.S. 6 (1981), this Court resolved the very same issue Kasper seeks to raise here, and the Courts below simply adopted the approach approved by this Court in those cases.

Kasper's contention that the 180-day limitations period should be tolled in the unique factual situation presented in this case is of no significance to anyone other than the parties to this action, and such a claim does not merit consideration by this Court. Kasper has not been able to identify any misrepresentation or misconduct which could estop FNMA from relying on the untimeliness of the charge, and no other basis for tolling the limitations period has been cited.

As the petition does not conform with the accuracy, brevity and clearness requirements of Supreme Court Rule 21.5, it should be denied. The petition fails to apprise FNMA adequately of the grounds for seeking certiorari, and the arguments that are comprehensible are meritless.

I. No Private Right Of Action Can Be Implied Under The FNMA Charter Act

In *Cort v. Ash,* 422 U.S. 66, 78 (1975), this Court indicated that the factors to be considered in determining whether to imply a private right of action were:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Of these factors, "the key to the inquiry is the intent of the Legislature." *Middlesex County Sewerage Authority v. National Sea Clammers Assn,* 453 U.S. 1, 13 (1981). "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction . . . [W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-16 (1979).

The purpose of the FNMA Charter Act was not to provide disgruntled employees with a remedy for adverse personnel decisions, nor was that statute designed for the especial benefit of FNMA employees. Rather, the purposes of the Act, as expressly declared by Congress, were "to establish secondary market facilities for home mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such

facilities to provide" special and supplementary assistance to the secondary market for home mortgages and for financing home mortgages. 12 U.S.C. § 1716.

Only during FNMA's "transitional period" from public agency to privately owned corporation did Congress consider employee protection provisions necessary. In its original form, the statute provided that:

> The Federal National Mortgage Association and the Government National Mortgage Association shall provide by contract for the conditions and methods under which and by which the Federal National Mortgage Association during the transitional period may employ [former GNMA employees] on [the effective date].

FNMA Charter Act, Pub. L. No. 90-448, § 810(d), 82 Stat. 476 (1968). The transitional period during which Congress deemed employee protection appropriate ended on May 21, 1970, pursuant to Section 810(b), and subsection (b) was repealed by Act of Aug. 22, 1974, Pub. L. No. 93-383, § 806(l), 88 Stat. 728. Once the transitional period ended, employee protection was considered unnecessary, and any enforceable rights that Kasper may have had expired at that time.

Thereafter, those FNMA employees hired prior to January 31, 1972, are to be considered government employees for so long as they continue in employment with FNMA only for purposes of "the civil service retirement law," 5 U.S.C. §§8331-8348. They are not performing governmental employment functions, and their selection and appointment are to be made "without regard to federal civil service and classification

laws." Instead, "merit and efficiency" are to be used in hiring and firing decisions. 12 U.S.C. § 1723a(d)(2).

That "merit and efficiency" provision confers no private right of action. *Canfield v. Sullivan,* 774 F.2d 1466 (9th Cir. 1985) (no private right of action exists to enforce "merit principles" to be applied to employees under Intergovernmental Personnel Act); *Howkins v. Caldwell,* 587 F. Supp. 98 (N.D. Ga. 1983), *aff'd without opinion,* 749 F.2d 731 (11th Cir. 1984), *cert. denied,* 471 U.S. 1117 (1985) (same). That provision simply distinguishes the manner in which appointments, promotions and separations were to be made at the newly created FNMA from those at GNMA where "civil service and classification laws" were applicable. 12 U.S.C. § 1723a(d)(1). When viewed in context, that single sentence cannot be characterized as a free-standing grant of private rights entitling an employee to judicial review of all appointments, promotions and separations.

As no private right of action for wrongful termination is expressly set forth in the Act and no indication of any Congressional intent to permit such a claim exists, the decision of the Eleventh Circuit was correct. Accordingly, the petition should be denied.

II. Kasper's EEOC Charge Was Untimely Filed

In *Delaware State College v. Ricks,* 449 U.S. 250 (1980), this Court held that the time period for filing an EEOC charge commences when an employee is notified of the termination decision even if that decision does not become effective until later. While Kasper attempts to distinguish *Ricks* as merely involving an allegedly discriminatory denial of tenure

rather than a termination, that same distinction was rejected in *Chardon v. Fernandez,* 454 U.S. 6 (1981). There, this Court, noting that "the fact of termination is not in itself an illegal act," ruled that the limitations period was triggered at the time that "the operative decision was made—and notice given—in advance of a designated date on which employment terminated." *Id.* at 8.

As Kasper was told that "[his] services [were] no longer required" on July 22, 1982, the 180-day period for filing a charge of discrimination commenced at that time, or, at the very latest, when he received the August 4, 1982 memorandum specifying that he would be retiring on August 5, 1983. The EEOC charge filed more than one year later was therefore untimely.

No basis for tolling that limitations period can be shown by Kasper, and, as the Eleventh Circuit noted, any tolling claim is belied by the fact that Kasper, as an attorney, is presumed to know the significance of limitations periods. *Pruet Production Co. v. Ayles,* 784 F.2d 1275, 1290 (5th Cir. 1986) ("as an attorney, Ayles is charged with knowledge of the law even though he may have had no experience in equal employment law"). Yet even after attending a seminar on age discrimination in March 1983, and becoming convinced that FNMA had somehow discriminated against him, Kasper waited almost six more months before filing his EEOC charge. *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 151 (1984) ("one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence").

Moreover, even if the 180-day period were tolled for some reason, the Court below found that limita-

tions period would have commenced no later than the fall of 1982, when Kasper met his 31-year old replacement. By failing to act until nearly a year after he had all of the information upon which his claim was based, Kasper could not use tolling to cure the untimeliness of his charge.

As his EEOC charge was time-barred, Kasper's ADEA action was properly dismissed. The petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 87-988

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE H. KASPER, JR

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations	ii
Reply Brief	1
"Counterstatement 1"	1
"Contract"	2
"Due Process"	4
"Conflicting Decisions"	7
"Important Questions"	7
"Ones other than Litigants"	7
"Tolling"	9
"Disputed Facts"	11
"Order of August 3, 1987"	12,13
Conclusion	15
Certificate of Service	

TABLE OF CITATIONS

Page no.

Federal Court Decisions

Hishon v. King & Spalding 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2 59 (1984). 12

Jackson Transit Auth. v. Local Division 1285, 457 U.S. 20, 102 S.Ct. 2202, (1982). 3

Machinists V. Central Airlines, Inc., 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963). 3

Mason v. Lister 562 F.2d 343 (5 Cir 1977). 8

Norfolk & Western R. Co. v Nemitz, 404 U.S. 37, 92 S.Ct. 185, 30 L.Ed. 2d 198 (1971). 3

Patterson v. Independent School Dist. #709, 742 F,2d 465 (1984). 8

Sexton v. Beatrice Foods Co. 630 F.2d 478 (1980). 8,12

Transamerica Mortgage Advisors, Inc. v. Lewis, 444U.S. 11, 100 S.Ct., 242 (1979). 3

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, George H. Kasper, Jr., files this Reply Brief to Brief of Respondent In Opposition to the grant of the Writ of Certiorari, and urges the grant of the Writ of Certorari.

FNMA Counterstatement of questions presented:

> "1. Whether claims never raised by the Petitioner in the Courts below, such as those relating to an alleged breach of contract, a supposed violation of due process, and related matters, can properly be included in a petition for a writ of certiorari."

is without merit.

The memoranda of employment from Sec. HUD Weaver and FNMA Pres. Lapin, and Petitioners written acceptance thereof, were attached to Petitioners affidavit of September 20, 1984 as ATTACHMENT A, as outlined in Petition for Writ of Certiorari

in Statement of Facts at p. 13.

In Reply Brief filed by FNMA in District Court in October 1984, at p. 13, FNMA acknowledges: "the Intervenor nevertheless contends that he has some sort of employment contract..." Yet, while ignoring Petitioners affidavit, contends that: "The general statements made at the time that FNMA was being reorganized and the general policies unilaterally adopted by FNMA at that time do not constitute a binding employment contract under Georgia law, and the Intervenor has no viable cause of action for breach of contract... Under Georgia law, an employment relationship for an indefinite term such as that between FNMA and the Intervenor is terminable at will... Either party to such a relationship may terminate it at any time without liability,"

FNMA also ignores Petitioners Government civil service employment status, FNMA's

"Federal Action" and the federal laws applicable to Petitioners employment relationship, both as incorporated in the contract and as by law. FNMA contends that it can terminate Petitioners employment by involuntary retirement "at will", "without cause' or "due process", "at any time without liability".

Jackson Transit Auth. v. Local Division 1285, 457 U.S. 20 at p. 22, 102 S.Ct. 2222 (1982):

> "[1] These decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes."

Machinists v. Central Airlines, Inc., 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed. 2d 67 (1963), Norfolk & Western R. Co. v. Nemitz, 404 U.S. 37, 92 S.Ct. 185, 30 L. Ed. 2d 198 (1971), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 at 18-19, 100 S.Ct., 242 at 246-47.

As to the "due process" claim -

In "Brief of Intervenor in Opposition to Defendant's Motion for Summary Judgment and for Judgment on the Pleadings" filed in District Court on October 1, 1984, Petitioner states, at p. 16: "First, Intervenor has not charged formal violation of the Fifth and Fourteenth Amendments. Although argument would well be made that such formal 'due process' requirements survived and inured to Intervenor's benefit by the very nature of the transition from Government to private FNMA, the representations made that new FNMA employees would have employment benefits equal to, if not better than, existing ones (which included formal 'due process'), and because of governmental involvement in doing federal work on contract. However, Intervenor does not need to charge such formal 'due process' denial.

Intervenor does allege the right to and

deprival of that 'due process' which was assured pursuant to the provisions of the transition and offer of employment with the new FNMA, those rights which have been provided and assured by FNMA in its procedures and policies, and those 'due process' requirements inherent in good faith and fair dealing that a person be informed of charges against him, given an opportunity to respond and not be dealt with summarily.

While employed by FNMA when it was within the Department of Housing and Urban Development, and with GNMA, Intervenor had those formal 'due process' rights guaranteed to an individual by the Constitution of the United States. Intervenor had 'due process' rights pursuant to those employment provisions offered Intervenor pursuant to the transition, commented on hereinbefore. Intervenor had a right to 'due process' from FNMA. At this juncture the Seminar Workbook 'Improving Employee

Selections, Evaluation & Termination Practices' [ATTACHMENT Q - Kasper Affidavit] becomes significant. None of the procedures set forth on page 41 were followed with respect to Intervenor."

To which, in Reply Brief filed by FNMA in District Court in October, 1984, at p. 17, FNMA states: "V. THE INTERVENOR'S DUE PROCESS CLAIMS SHOULD BE DISMISSED. The Intervenor has conceded that he has no formal right to due process under the Fifth and Fourteenth Amendments... He apparently now asserts that he has a right to some sort of due process under state law."

The due process, and breach of contract issues were presented and argued before the District Court in October, 1984.

FNMA represents to this Court that:

"At no time in the Courts below did Kasper present the due process, breach of contract and related issues he seeks to raise, and, for that reason alone,

the petition should be denied with respect to those matters."

This representation is obviously not true.

We will not burden the record here by repeating the conflicts existing among the various courts as to the issues raised, and their application to the facts of this case, beyond what has been presented in the Petition for Writ, and as herein shown.

FNMA further charges that "no important questions of law are involved in Kasper's claims." Petitioner contends that these questions, again, are obvious. The misapplication of Ricks, Fernandez, Cort and Transamerica are shown in the Petition.

FNMA contends that "no one other than the litigants in this action" would be affected. All FNMA employees, especially those with "government status" will be affected by FNMA contention that it can terminate employment "at will", "without cause" or "due process", "at any time

without liability". FNMA civil service employees are affected when FNMA asserts unlawful authority to unilaterally amend the civil service early retirement plan so as to allow FNMA to involuntarily force them to retire against their will and accept reduced civil service annuity payments contra to the law requiring that the retirement be strictly optional with employees. Mason v. Lister, 562 F.2d 343 (5 Cir 1977) previously cited, also Patterson v. Independent School Dist. #709, 742 F.2d 465 (1984) and Sexton v. Beatrice Foods Co. 630 F.2d 478 (1980) at p. 482 and 483:

> "the § 4(f)(2) exception is applicable only where the scope of involuntary termination is expressly provided for in an employee's retirement plan." and
>
> "It is also important that a retirement plan gives the employee notice of the age at which the employer may force him to retire, since the lack of such notice deprives the employee of an adequate understanding of his financial and other expectations under the plan. Congress would not have exempted from ADEA liability an age-based retirement pursuant to a plan if the plan did not give the employee sufficient information to

enable him to plan for his retirement or to negotiate with his employer for some other mutually acceptable arrangement."

As to tolling of the 180-day filing limitations period - Petitioner has identified the FNMA misrepresentations, misconduct and Policy and Procedures which estop FNMA from relying on the limitations period. First, it should be emphasized that Petitioner contends that his filing, within 12 days of involuntary retirement, was timely. However, in any event, FNMA is estopped from claiming the limitation.

The evidence shows that FNMA has intentionally created and skillfully orchestrated a situation, at its own option, to its advantage, with the ultimate goal of unlawfully retiring Petitioner and avoiding a successful ADEA action. The precise timing of events from July 22, 1982, until August 5, 1983 could not have been accidental. The events were intentionally tailored, at FNMA's option, to take

advantage of FNMA's perception of the application of the "one year notice" as discussed in Ricks.

FNMA tried to coerce Petitioner into voluntary retirement on August 5, 1983 by creating civil service retirement eligibility, tightening the "economic noose" and reducing his salary on a quarterly basis while at the same time negotiating with him on other benefits as late as July 26, 1983. FNMA misrepresented his employment status, transferred Petitioner on October 4, 1982 without advising him, and created a confusing, ambigious employment status, while retaining him as Assistant Regional Vice President- Counsel until August 5, 1983, in order to delay Petitioners filing of his EEOC charge, until after FNMA exercised its options and revealed its true intentions. FNMA then claimed that Petitioner had filed his EEOC charges too late.

The Petition for Writ of Certiorari is long, however, within limits. A half is dedicated to "Petitioner's Complaint" and "Statement of Facts" and is as concisely presented as these will allow for the Court to have before it in the Petition these facts and the applicable law. It is apparent that Petitioners statement of facts differs materially from FNMA's conclusions as to Petitioners affidavits. As an illustration note: the different reasons for the letters of recommendation, when Petitioner (decided or felt for the first time that perhaps FNMA had discriminated against him) (on March 11, 1983 or the latter part of March) and whether it was after (learning the law or discovering additional facts), whether Petitioners conduct was (gentlemanly or deleterious), whether authority to terminate Petitioners employment was in (Austin, Burfiend or the FNMA Board of Directors),

whether a FNMA Asst. Regional V. Pres. (is an officer or not), whether Petitioner seeking other employment in May 1983 was (to mitigate his damages or to recognize Austins authority to terminate his employment), (whether Petitioner agreed to his treatment by FNMA or not) and many, many more including the application of the appropriate law such as estoppel, release etc. It is apparent from the order of August 3, 1987 that the Court gave heavy consideration to FNMA's contentions although they were contrary to the evidence and Petitioners affidavits as well as the Attachments thereto as well as the allegations. See: Sexton, supra at p. 479:

> "We shall here state the basic facts and inferences drawn from them in a way most favorable to Sexton, as we must in considering this motion for summary judgment. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

and Hishon v. King & Spalding 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

"2. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Dispute exists as to material facts which should not have been decided by the Court on summary judgment. Petitioner is not required to prove his entire case by affidavit on motion for summary judgment. Petitioner is entitled to a jury trial on these issues.

The order of August 3, 1987 at p. A-25 states: "Discussions with Burfeind established that Kasper would receive credit for 19 years of service and 6 months severance pay. An agreement was reached..." (Emphasis supplied). That "an agreement was reached" - is contrary to the evidence. Burfeind's Memo to the Files providing "Continuing Employment Arrangements..." does not purport to be an agreement between FNMA and Petitioner. It was, at most, an offer. FNMA refers

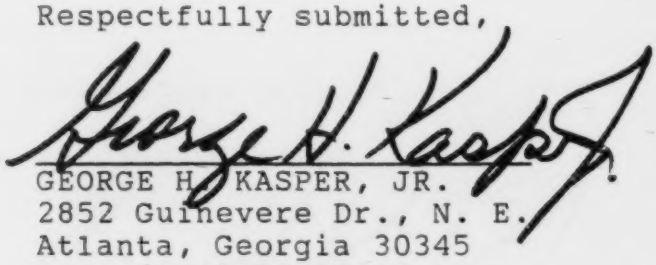
to it as an "offer". However, the Memo, even if it amounts of an offer, probably is not valid or enforceable. It would probably be construed as an illegal offer to perpetrate a fraud on the Civil Service Commission if no actual employment existed as represented, or was not intended to exist at FNMA's option, especially if it was to delay timely EEOC charges. FNMA certified to the Civil Service Commission and to the State of Georgia that Petitioners employment with FNMA continued as ARVP-Counsel until August 5, 1983 when he was then involuntarily retired. Yet, in order to bar Petitioners EEOC claim, FNMA tells the Court that employment was terminated on July 22, 1982, Something is wrong. FNMA had a suggested "Release Form" for use in termination of employment. Why was this release not offered if termination was intended in July 1982, as it was discussed on July 26, 1983? A voidable illegal offer

is not an agreement.

CONCLUSION

For the reasons shown in the Petition for Writ of Certiorari,the Brief of Respondent in Opposition, and this Reply Brief of Petitioner, the Petition for Writ of Certiorari should be granted and the judgment of the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Reply Brief of Petitioner to Brief of Respondent in Opposition to Petition for Writ of Certiorari upon

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Attorneys for Respondent, Federal National Mortgage Association, by first class mail, duly addressed and postage prepaid.

This 22nd day of January, 1988.

George H. Kasper, Jr.
Attorney for Petitioner
Pro Se.